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In the Supreme Court of the United States

OCTOBER TERM, 1967

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

PURITY FOOD STORES, INC. (SAV-MORE FOOD STORES)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in this case on May 8, 1967.

OPINIONS BELOW

The opinion of the court of appeals (App. C, *infra*, pp. 48-56) is reported at 376 F. 2d 497; its prior opinion is reported at 354 F. 2d 926 (App. A, *infra*, pp. 20-28). The Board's Supplemental Decision and Order (App. 8, *infra*, pp. 29-47) is reported at 160

N.L.R.B. No. 53; its original Decision and Order (J.A. 310-332)[1] is reported at 150 N.L.R.B. 1523.

JURISDICTION

The revised decree of the court of appeals was entered on May 10, 1967 (App. C, *infra*, p. 58). On August 1, 1967, Mr. Justice Fortas extended the time for filing a petition for a writ of certiorari to and including September 5, 1967. We invoke the jurisdiction of this Court under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act (29 U.S.C. 160(e)).

QUESTION PRESENTED

Section 9(b) of the National Labor Relations Act directs the Board to determine the appropriate unit for purposes of collective bargaining. Pursuant to this provision, the Board has ruled that a single-store unit in a retail chain store operation is presumptively appropriate. In this case, the Board, applying its single-store policy, found that one of the company's chain stores was a distinct economic unit, inherently apt for collective bargaining, and accordingly designated it as the appropriate unit. The question presented is whether the court of appeals was justified in rejecting the Board's single-store policy, and overturning its selection of the unit, primarily because the

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[1] "J.A." refers to the joint appendix in the court of appeals. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

company exercised a centralized control over the stores in its chain.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are printed in App. D, *infra*, pp. 59-60.

STATEMENT

A. The Original Decisions

In its first decision, the Board found that Local 1435, Retail Clerks International Association, AFL-CIO, represented a majority of the employees employed at respondent's Peabody, Massachusetts, retail grocery store; that the Peabody store was an appropriate unit for purposes of collective bargaining; and that the company had violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the union as the representative of the employees in that unit (J.A. 314-317). On review of the Board's order directing the company to bargain with the union, the court of appeals concluded that the Board had misconstrued or failed to consider relevant evidence in making its unit determination, and remanded the proceeding to the Board for further consideration of that determination, especially with respect to its rejection of the company's contention that the only appropriate unit was a multi-store unit comprising the employees

in the company's chain of seven retail grocery stores. 354 F. 2d 926.[2]

B. The Board's Findings and Conclusion Upon Remand

1. *The Board's findings of fact*

Upon remand, the Board reexamined the entire record and found the facts to be as follows:

Respondent, a Massachusetts corporation, owns and operates a chain of seven supermarkets, all located within a radius of 30 miles of the company's central office at Chelmsford, Massachusetts (App. B, *infra*, p. 31; J.A. 109-112, 307).[3] The company employs about 400 employees in its retail chain. During the period relevant to this proceeding, approximately 108 employees worked in the Peabody store. Of this number, 32 regularly worked fewer than 15 hours weekly (App. B, *infra*, pp. 36-37; J.A. 6-7, 212, Resp. Exh. 16).

The company's central office selects all suppliers, negotiates the prices to be paid, and pays them directly (App. B, *infra*, pp. 31-32; J.A. 131-134, 140-142, 146-150). Central office executives also order directly meat, produce, delicatessen and some grocery items

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[2] The court affirmed findings of the Board that the company had engaged in coercive conduct in violation of Section 8(a)(1), that a majority of the employees at the Peabody store had designated the union as their bargaining representative, and that the company had no good-faith doubt as to this majority.

[3] The company also has a produce and dairy warehouse at Chelmsford, and operates its own trucking operation from there (App. B, *infra*, p. 31; J.A. 112-113).

(App. B, *infra*, p. 33; J.A. 133, 135, 139, 199-200, 236-237), but the local store management purchases other products directly from an approved list of suppliers and has discretion as to the quantities purchased (App. B, *infra*, p. 39 n. 11; J.A. 132, 138-139, 199, 201).

The day-to-day supervision of an individual store is the responsibility of a "store supervisor." He has a dual function, devoting part of his time to the supervision of a specific store and the remainder of his time as a central office executive responsible for the chain-wide purchasing and handling of a particular category of merchandise (App. B, *infra*, pp. 33, 41 n. 15; J.A. 150-151, 133-134, 146-147, 264-265).[4] Each store has a full-time store manager and a supervisory staff of department heads. In the absence of the store supervisor, the store manager is in charge of the store and approves time off, assigns work, receives merchandise and resolves other problems and disputes (App. B, *infra*, pp. 33, 38-41; J.A. 70-71, 89-90, 118-119, 122-123, 133-138, 155, 196-198, 202, 264-265).[5] The central

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[4] The store supervisor at the Peabody store, Edward Goggins, is also store supervisor at the Billerica store and is the central office executive responsible for merchandising groceries throughout the chain.

[5] In connection with their responsibility for merchandising specific product categories, central office executives visit the departments in all stores which handle their respective merchandise categories. For example, Raymond Renaud, the central office executive in overall charge of produce in all seven stores, testified that he spends a total of about five hours a week in the Peabody store (J.A. 117, 137-138, 196-198). The Board rejected the contention that these

office maintains detailed and separate records of each of the seven stores, including a profit-and-loss statement for each individual store (App. B, *infra*, pp. 32, 38 n. 7; J.A. 130, 199).[6] Other administrative functions, such as advertising, refrigeration maintenance, electrical work, and security, are also provided by the central office (App. B, *infra*, pp. 32-34; J.A. 168, 170, 176-177, 206, 208-209).[7]

Employees are generally hired at the store level, although a few employees in certain departments (meat, produce and delicatessen) are hired at the central office by those executives having chainwide re-

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visits made all such central office executives the immediate departmental "supervisors" in all stores, in addition to the position of store supervisor which some held in particular stores. The Board assumed that the store supervisors could actually supervise the departments in their respective stores when they were present (thus, Goggins spent about 50 per cent of his time at the Peabody store (J.A. 119, 264-265)). The Board concluded, however, that in the absence of the store supervisor it is inescapable that the store manager and his department heads perform the "hour-by-hour or day-by-day" supervision in the store (App. B, *infra*, p. 41 n. 15).

[6] Daily reports are sent to the central office from the stores (J.A. 153). Clerks at the individual stores tabulate daily receipts and reconcile them against register tallies. Each store's daily receipts are then deposited in a separate branch depository before remittance to a chainwide account (App. B, *infra*, pp. 35, 38 n. 7; J.A. 119-120, 125, 156-157). Time records are also kept by clerks in the individual stores and are sent to the central office on a weekly basis (App. B, *infra*, p. 32; J.A. 130-131).

[7] Customer complaints are handled at the store level (App. B, *infra*, p. 39; J.A. 119, 131).

sponsibility for those products.[8] Of the approximately 108 employees at the Peabody store, all part-time employees were hired either by the store supervisor or the store manager, and only three or four of the full-time employees were hired at the central office and referred to the store (App. B, *infra*, pp. 38-39 n. 8; J.A. 122). Employees are discharged and disciplined at the store level either by the store supervisor or, in his absence, by the store manager (App. B, *infra*, pp. 39-40 n. 12; J.A. 123, 153-155, 165-166).[9]

As is customary in any retail chain operation, employees at each store perform parallel, as distinguished from integrated, functions; and the success or failure of the performance in one store in no way determines the effectiveness of day-to-day operations at any other

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[8] In finding, upon the basis of the testimony of Store Supervisor Goggins (*supra*, n. 4), that hiring and firing are done primarily at the store level, the Board rejected the Company's assertion that this was essentially done "centrally." The Board did not deem hiring and firing by a store supervisor, or by his store manager in his stead, at the store level as "central" action merely because the store supervisor, when in the performance of other duties in his dual-function capacity, acted as a central office executive with chain-wide responsibility for the merchandising of a particular product (App. B, *infra*, p. 41).

[9] On August 29, 1964, the Company gave a general wage increase to the employees in all seven of its stores. This increase was the same as the wage increase which, shortly before August 1964, was negotiated between the Retail Clerks International Association and several other competing grocery chains. In all the years it has been in business, the Company has given its employees the same general increases as have been given by those other chains (App. B, *infra*, pp. 36-37; J.A. 5, 18-19, 53-54, 72-73, 182-183, 209-210, 317, 329, n. 2).

store (App. B, *infra*, p. 38). Transfers or interchange of employees from store to store are the exception.[10]

The central office determines the hours during which each store is to be open for business and the number of employees to be employed in each store; but the decision as to the distribution of work is made at the store level (App. B, *infra*, pp. 34, 39 n. 9; J.A. 121-123, 168-169, 204-205).

2. *The Board's supplemental decision and order*

On these facts, the Board reaffirmed its prior decision that the employees at the company's Peabody store constituted an appropriate unit for collective bargaining. The Board followed its policy of deeming a single store in a retail chain a "presumptively appropriate" unit,[11] and it concluded that no factor here

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[10] Transfers, both permanent and temporary, are always on a voluntary basis, and at the Peabody store average about one per week in a work force of more than 100 employees. This includes transfers of short duration where an employee works overtime in a different store or where an employee works on Sunday to take inventory at another store, and also supervisory and promotional transfers. Of 118 transfers into and out of the Peabody store over a two-year period, involving 54 different employees, only 24 were permanent transfers; 94 were temporary, and of these only 35 were for more than 10 hours. (App. B, *infra*, pp. 36, 42 n. 16; J.A. 66, 86, 168, 171-176, 207-208, 316, Resp. Exh. 14-15).

[11] See, *e.g.*, *Sav-On Drugs, Inc.*, 138 N.L.R.B. 1032; *Frisch's Big Boy Ill-Mar, Inc.*, 147 N.L.R.B. 551, enforcement denied, 356 F. 2d 895 (C.A. 7); *Winn-Dixie Stores, Inc.*, 143 N.L.R.B. 848, enforced, 341 F. 2d 750 (C.A. 6), certiorari denied, 382 U.S. 880; *P. Ballantine & Sons*, 141 N.L.R.B. 1103, 1107; *Davis Cafeteria, Inc.*, 160 N.L.R.B. No. 80.

rebutted that presumption (App. B, *infra*, pp. 40-41, 46-47). Recognizing that the company's operation of the chain of stores and its administrative structure "reflect[ed] a large degree of centralized control including delegation of authority over individual store operations to dual-function executives", the Board nevertheless concluded that these factors, which are a common attribute of any retail chain operation, did not render the single store unit inappropriate (App. B, *infra*, pp. 41-42). The Board found that each of the company's stores operated as a distinct economic unit in a different market, with the success or failure of any one store being independent of the performance at another store, that significant decisions made with regard to the operations of an individual store (hiring, firing, employee work schedules, etc.) were not relevant to other stores, and that the employees at an individual store performed functions which were parallel to, rather than integrated with, the functions performed by employees in the other stores (App. B, *infra*, pp. 37-40).

Specifically, the Board found that the Peabody store was a geographically separate and functionally distinct economic unit, possessing substantial autonomy with respect to operational matters and the local implementation of chain-wide policy, and that the store employees regularly work together and have common interests in relation to their employer which in some respects are separate and apart from those of employees in other locations. (App. B, *infra*, pp. 37-40). A single store unit in a retail chain operation, possess-

ing those characteristics, is, the Board said, inherently apt for bargaining purposes, the equivalent of the plant unit which has long been deemed presumptively appropriate under Section 9(b) of the Act, and therefore constitutes the basic appropriate unit for chain store employees (App. B, *infra*, pp. 45-46).

The centralized administrative control which the company exercised in its chain of stores was, in the Board's judgment, insufficient to rebut the inherent appropriateness of the single store unit for purposes of collective bargaining. Bargaining limited to the Peabody store, the Board declared, "will neither preclude Respondent's continued reliance upon centralized policy determinations, defeat its practice of utilizing central office executives to oversee day-to-day store operations, nor otherwise impair effective management of the chain. * * * In our judgment, the institution of localized bargaining on behalf of the separate, identifiable group of Peabody employees, involving, *inter alia*, such matters as the establishment and administration of local work rules, grievance protections, vacation programs, seniority, and pension rights, as well as the setting of wage rates, is not only entirely feasible, but would not unduly encroach on the Employer's various administrative controls." (App. B, *infra*, pp. 43-44.)

Accordingly, the Board reaffirmed its previous findings that the company had violated Section 8(a)(1) and 8(a)(5) of the Act by failing to recognize and bargain with the Union as the representative of the employees in an appropriate unit and by engaging in other coercive conduct (App. B, *infra*, p. 47; *supra*,

n. 2). The Board ordered the company to cease and desist from the unfair labor practices found; to bargain with the union upon request; and to post appropriate notices (J.A. 317-320).

C. The Decision of the Court of Appeals

The court of appeals rejected the Board's finding that the single-store unit was an appropriate unit and set aside the Board's bargaining order.[12] The court acknowledged the broad discretion which the Act confers upon the Board in making unit determinations and that its judgment as to what constitutes an appropriate unit is rarely to be disturbed. It declined to defer to the Board's judgment here because "the Board's unit determination simply does not square with its specific findings * * *." (App. C, *infra*, p. 56). Attaching no weight to "[t]he Board's simple declaration that single store units are considered 'presumptively appropriate'" (App. C, *infra*, p. 56), the Court held (App. C, *infra*, pp. 54-55):

> The evidence and the Board's specific findings based thereon disclose a small, compact, homogeneous, centralized and integrated operation. The findings now made confirm this court's previous view that "it would be difficult to find a more integrated operation, or less difference among employees." Under some circumstances a single store in a retail chain may constitute an appropriate bargaining unit. But on the evidence and

[12] The court entered a decree enforcing the portion of the order based on the Section 8(a)(1) violations which it had affirmed in its original decision (n. 2, *supra*, p. 4).

findings in this case we can see no rational basis for fractionating the respondent's organization for purposes of collective bargaining.

REASONS FOR GRANTING THE WRIT

In rejecting the Board's rule that a single store is presumptively the appropriate bargaining unit in the retail chain store field, and its application of that rule in the circumstances of the present case, the court below has improperly substituted its judgment for that of the Board in an area which, barring exceptional circumstances, is uniquely reserved to the Board. The decision below is inconsistent—with respect both to the proper scope of judicial review of Board unit determinations and in the result—with decisions of the Third, Sixth, and Ninth Circuits upholding the Board's application of its single-store policy. In addition, the proper geographic scope of bargaining units in the retail industry is clearly a problem having large practical dimensions. The retail trade employs approximately nine million individuals. U. S. Bureau of the Census, *Statistical Abstract of The United States: 1965* (86th ed.) p. 223. Intensive efforts are being made to organize these employees, and the scope of collective bargaining units may be crucial in determining whether they are successful. The Board has rendered more than 30 formal decisions involving its unit policy in the retail industry since the *Sav-On Drugs* case in 1962 (n. 11, *supra*, p. 8), and that policy has been applied by the Board's regional directors in many other cases. Its validity presents a question of manifest importance in the

administration of the National Labor Relations Act—and one, we submit, which clearly warrants review by this Court.

1. Section 9(b) of the Act empowers the Board to decide "in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." In determining what is an appropriate unit in a particular case, the Board has traditionally looked to such factors as the community of interest among the employees sought to be represented; whether they comprise a homogeneous, identifiable, and distinct group; the prior bargaining history; and the geographic proximity of various parts of the employer's operation.[13] Plainly, the statutory standard—appropriateness—leaves the selection of the unit largely to the Board's expert judgment. And early in the history of the Act this Court stressed the special deference which the courts of appeals should accord to the Board's selection of a collective bargaining unit; that determination, the Court declared, "involves of necessity a large measure of informed discretion and the decision of

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[13] *May Department Stores Co.* v. *National Labor Relations Board*, 326 U.S. 376, 380; *Foreman & Clark, Inc.* v. *National Labor Relations Board*, 215 F. 2d 396, 406 (C.A. 9), certiorari denied, 348 U.S. 887; *Harris Langenberg Hat Co.* v. *National Labor Relations Board*, 216 F. 2d 146 (C.A. 8); *Texas Pipe Line Co.* v. *National Labor Relations Board*, 296 F. 2d 208, 212-218 (C.A. 5); *National Labor Relations Board* v. *West Kentucky Coal Co.*, 152 F. 2d 198, 202 (C.A. 6); *National Labor Relations Board* v. *Smith*, 209 F. 2d 905 (C.A. 9).

the Board, if not final, is rarely to be disturbed." *Packard Motor Car Co.* v. *National Labor Relations Board*, 330 U.S. 485, 491.[14]

The Board held for a time that in the absence of unusual circumstances the appropriate unit in a retail chain should be all the employees within an administrative division or geographic area.[15] But in 1962 the Board reexamined this policy and concluded that it unduly prejudiced the right of self-organization which the Act guarantees. *Sav-On Drugs, Inc.*, 138 N.L.R.B. 1032, 1033. Since, and in accordance with that decision, the Board has found single-store units appropriate in a retail chain unless there were countervailing factors present,[16] and the Board's application of

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[14] Cf. *National Labor Relations Board* v. *Krieger-Ragsdale & Co., Inc.*, 65 L.R.R.M. 2418, 2419 (C.A. 7):

> Unit determinations are not findings of fact, but judgments upon the facts in accordance with varying guidelines of relevancy or rules of inference based upon experience and the purpose of the statute being administered. Because the exercise of discretion is a judgment and application of relevancy in a particular case, prior Board unit determinations in other cases have precedential value only in the sense that they disclose facts the Board has previously considered relevant.
>
> * * * Our function, therefore, is to review the Board's exercise of discretion and decide whether the Board's unit determinations were reasonable, as applied to the facts.

Accord: *National Labor Relations Board* v. *Sun Drug Co.*, 359 F. 2d 408, 413 (C.A. 3); cf. Jaffe, *Judicial Control of Administrative Action*, pp. 555-556 (1965).

[15] *Safeway Stores, Inc.*, 96 N.L.R.B. 998; *Weis Markets, Inc.*, 125 N.L.R.B. 148; *Daw Drug Co., Inc.*, 127 N.L.R.B. 1316.

[16] See cases cited p. 8, n. 11, *supra*. Since the *Sav-On Drugs* decision, the Board has found the single-store unit in-

its single-store policy in the retail industry has been approved by the Courts of Appeals for the Third, Sixth, and Ninth Circuits. *National Labor Relations Board* v. *Sun Drug Co.*, 359 F. 2d 408, 412-413 (C.A. 3); *National Labor Relations Board* v. *Winn-Dixie Stores, Inc.*, 341 F. 2d 750, 755 (C.A. 6), enforcing, 143 N.L.R.B. 848, 860-861, certiorari denied, 382 U.S. 830; *National Labor Relations Board* v. *Merner Lumber and Hardware Co.*, 345 F. 2d 770, 771-772 (C.A. 9), enforcing, 145 N.L.R.B. 1024, certiorari denied, 382 U.S. 942. See, also, *National Labor Relations Board* v. *Primrose Super Market of Salem, Inc.* (C.A. 1), 58 LRRM 2863, enforcing without opinion 148 N.L.R.B. 610, certiorari denied, 382 U.S. 830; cf. *National Labor Relations Board* v. *Frisch's Big Boy Ill-Mar, Inc.*, 356 F. 2d 895 (C.A. 7).

The Board's unit policy in the retail industry comports with the statute and Board policy in other industries. It is elementary that there may be more than one appropriate unit—more than a single way in which the employees of a given employer appropriate-

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appropriate only where the following factors exist: (1) where there is a stable bargaining history of many years in the multi-store unit (*Meijer Supermarkets, Inc.*, 142 N.L.R.B. 513; *The Great Atlantic & Pacific Tea Co., Inc.*, 153 N.L.R.B. 1549); (2) where the single store lacks identity as a self-contained economic unit (*Mary Carter Paint Co.*, 148 N.L.R.B. 46; *Carribean Restaurants*, 162 N.L.R.B. No. 60; or (3) where a city-wide unit in a multi-city chain is requested, the stores are geographically proximate, there is frequent interchange of employees between the stores, and no party requests a smaller unit (*Weis Markets, Inc.*, 142 N.L.R.B. 708; *Spartan Department Stores*, 140 N.L.R.B. 608).

ly may be grouped for purposes of collective bargaining under proper criteria for determining the bargaining unit. This is true in the retail industry. But the single store in a retail chain is at least a presumptively appropriate unit for bargaining, since it is a distinct administrative unit; the employees comprise a homogeneous and identifiable group; and they share common interests, in regard to supervision, work schedules, grievances and the like. In this respect, the single store is analogous to a plant in a multi-plant industrial concern or to a district office in the insurance industry.

Section 9(b) of the Act specifically recognizes a plant unit and the Board has long held that a unit confined to the single plant of a particular employer is presumptively appropriate.[17] In the insurance industry, the Board has deemed the district office as the industry's analogue of the single manufacturing plant.[18] The single-store unit in a retail chain operation, which is a geographically separate and functionally distinct economic unit, is the equivalent of the plant unit or the insurance district office unit and equally appropriate as a separate bargaining unit.

The presumptive appropriateness of the single chainstore unit is not overborne by the centralized control and multi-store supervision which are charac-

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[17] *Temco Aircraft Corp.*, 121 N.L.R.B. 1085, 1088, n. 11; *Dixie Belle Mills*, 139 N.L.R.B. 629, 631; cf. *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 313 U.S. 146, 164-166.

[18] *Metropolitan Life Ins. Co.*, 156 N.L.R.B. 1408, 1414 (decision on remand from 380 U.S. 438), and cases cited therein.

teristic of retail chain store operations. Localized bargaining is viable, and works no impairment of management's centralized control. Localized bargaining and centralized control can coexist as feasibly in the retail industry as in the multi-plant industrial enterprise or in the insurance industry. As the Board observed (App. B, *infra*, p. 44), to draw a distinction between the single chain store and the single plant in a multi-plant enterprise or the insurance district office "would artificially disadvantage the organizational interests of * * * chainstore employees, simply because their employer operates a chain rather than a single-store enterprise" and "would vest the chain operator with absolute power alone to control the scope of the appropriate unit."

2. In the instant case, the Board found that the Peabody store, like other retail outlets, possessed "sufficient attributes of autonomy to be presumptively appropriate" and that no factors rebutting that presumption were present (App. B, *infra*, pp. 46-47). The Board stressed the following factors: (1) the Peabody store was geographically separated from other stores in the chain; (2) the employees in the Peabody store performed work functions which were parallel to, rather than integrated with, the functions of the employees in the other stores; (3) significant decisions (hiring, firing, work schedules, etc.) relevant only to the Peabody store were made at the store level; (4) interchange of employees between the Peabody store and the other stores was slight, involving only one per cent of the work force per week, and then often for short overtime periods on a voluntary basis; (5) each

store was entirely independent of the other stores with respect to success or failure of performance, and separate profit-and-loss statements were kept for each store; and (6) there was no multi-store bargaining history or other special circumstances.

In rejecting the Board's reasonable determination that the circumstances did not warrant an exception to its single-store rule, the court below gave decisive weight to the centralized control which the employer exercised over the chain; it could see "no rational basis for fractionating the respondent's organization for purposes of collective bargaining" (App. C, *infra*, p. 55).[19] So saying, the court rejected the Board's policy that a single-store unit in the retail field is presumptively appropriate, for the centralization which the court deemed dispositive is, of course, quite typical of retail chains, especially the larger ones. An exception for centralized chains would swallow the single-store rule. The court was, indeed, quite candid that the Board's presumption counted for nothing in its eyes (see App. C, *infra*, p. 56). The issue thus emerges well defined: it is the validity of the single-store policy. And for the reasons stated earlier, this issue merits the consideration of this Court.

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[19] The court also mentioned the "frequent interchange of employees from store to store" as a factor in its decision. There is no dispute about the extent of interchange. And the Board, correctly, we think, discounted it as minimal. (See n. 10, *supra*, p. 8.) Certainly, there is no indication that the amount of interchange exceeded the norm for retail chain stores.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1967.

APPENDIX A

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 6582

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

PURITY FOOD STORES, INC.
(SAV-MORE FOOD STORES), RESPONDENT

On Petition for Enforcement of an Order of
The National Labor Relations Board

Before ALDRICH, *Chief Judge*, HASTIE *
and MCENTEE, *Circuit Judges*.

OPINION OF THE COURT

December 30, 1965

ALDRICH, *Chief Judge*. In this petition to enforce an order of the National Labor Relations Board based upon alleged violations of sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) and (1), respondent answered, praying that the order be set aside. The findings as

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* By designation.

to subsection (1), of improper interference with organization by surveillance and overly hostile talk, are clearly correct and need not be considered. The sole questions are whether the union had enrolled a majority of the unit, and whether the unit was in fact appropriate. Because for no good reason, indeed, for no given reason, the employer refused the offer of an independent card check, under familiar principles it cannot assert a good faith doubt as to the number claimed. *NLRB* v. *George Groh & Sons*, 10 Cir., 1964, 329 F.2d 265, 269. By its clearly established (8)(a)(1) violations it is barred from asserting a good faith, although erroneous, doubt as to the appropriateness of the unit. *NLRB* v. *Primrose Super Market of Salem, Inc.*, 1 Cir., 1965, F.2d.

The facts as to representation are these. On May 13 and 14, 1964, as a result of what the trial examiner termed a "quickie" organizational campaign, the union [1] obtained 66 cards from the 107 full and regular part-time employees of the respondent Purity Food Stores' Peabody, Massachusetts store. The Board reduced this number to 65.[2] If this figure

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[1] Local 1435, Retail Clerks International Ass'n, AFL-CIO.

[2] The Board eliminated the card of a 17-year old part-time employee who the trial examiner found was threatened by one of the organizers, in the presence of other employees, with violence that was barely averted. In confining the elimination to one vote, where the trial examiner had made no findings on that subject, the Board's disregard of what would seem to us the natural effect of such conduct upon other part-time employees of like age, as well as its refusal to draw inferences of the possibility of similar conduct with respect to other young employees, seems to us very close to impermissible. We would think the reason for requiring secret elections would loom large when such improper union activity was established. Possibly the Board felt that this impropriety was offset by the employer's.

should be further reduced by the number of cards obtained by one Silva, the union would not have a majority.

Silva was found by the trial examiner to be a supervisor, making cards obtained by him void. *NLRB* v. *Hamilton Plastic Molding Co.*, 6 Cir., 1963, 312 F.2d 723. The Board reversed this factual finding. It is admitted that Silva did not have power to hire and fire, and that he was, fundamentally, an "aisle boy." This does not mean that he could not have adequate supervisory powers over other employees. Respondent contends that Silva had power "responsibly to direct [other employees that was] . . . not of a merely routine or clerical nature, but require[d] the use of independent judgment." Section 2(11). The trial examiner in effect so found. In reversing this conclusion the Board said there was "no evidence that . . . Silva . . . 'responsibly gave instructions to employees.' . . . Silva was merely a conduit for relaying . . . instructions . . . ." We have reviewed the record and do not find the Board's characterization unsupportable.

We come, therefore, to the propriety of the Board's finding that the Peabody store was an appropriate unit. Respondent owns seven supermarkets, hereinafter stores, in an area north of Boston. Some years back an unsuccessful attempt had been made to organize all seven jointly. The present organizational campaign was directed only against Peabody. The Peabody store is the farthest away (30 miles) from Chelmsford, where another store and the principal offices are located. The trial examiner, having discarded Silva's share of the enrollment, had no occasion to pass on the appropriateness of a single store, and made no findings. Respondent says that the Board's finding "ignores substantial parts of the

record, and misstates and misconstrues other parts . . . ." Because this statement is certainly correct, we must, regretably, review the record in detail.

The following quoted text, with one paragraph at the end, which we summarize, constitutes the Board's entire findings on the subject of the unit. The footnotes are our additions and comment. The only evidence we recite in the footnotes comes from General Counsel witnesses not stated to be disbelieved, or from employer testimony which was not rejected, directly or indirectly, or impeached, and which appears inherently credible. *Chesapeake & Ohio Ry.* v. *Martin*, 1931, 283 U.S. 209, 216. The Board said,

> "In the instant case the record reveals the following relevant[3] facts:
>
> "Respondent operates 7 stores in the State of Massachusetts, 4 under the name "Purity-Sav-More;' 2 under the name Sav-More, and 1 under the name 'Converse-Sav-More.' The Peabody store is approximately 10 miles from the nearest of the other stores in the chain, and about 30 miles distant from Respondent's main offices. The Peabody store advertises in different area newspapers and circulars which do not list the name and location of all of the stores in the chain.[4] Store hours vary among the 7 stores.[5] The

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[3] If this is a backhanded ruling that all remaining, unmentioned, facts are not relevant, it is clearly erroneous.

[4] When respondent advertises in Boston papers, all seven stores are mentioned. Respondent also advertises by radio, always listing all seven stores.

[5] The hours are determined exclusively by respondent's president, who, incidentally, spends considerable time in each store.

management of each store determines the number of employees required to staff the store.[6] Persons employed in the Peabody store are hired at that store and must fill out an application for employment at the Peabody store.[7] Almost all of the part-time employees, who comprise about 50 percent of the work force at the Peabody store, come from the Peabody area.[8]

"The actual operations of the Peabody store are under the direct control of the store manager and the 'store supervisor,' the latter dividing his time about equally between the Peabody store and another store in the chain.[9] The store super-

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[6] We have not discovered the basis for this finding. As we read the testimony it was that the number of employees was determined jointly by the store executive and the local store manager on the basis of volume figures (supplied by the central office) by applying a formula, uniform for all stores, issued by the central office.

[7] This sentence should have started with the word "Some." In each store there are four departments, meat, produce, delicatessen, and grocery. Full-time employees in the first three departments are hired at the central office by the pertinent central office executive, who determines which store they will be placed in. Grocery, cashiers, and office help are hired "mostly" by local management. Full and part-time cashiers, however, are trained by central office personnel, who has full say whether they are to be retained. So far as we can discover, the application-filling-out referred to by the Board as a "must" is local only to the extent that the employment may be. Even local employment must be as a result of filling out a uniform application supplied by the central office.

[8] We have no criticism of grouping full and part-time employees, but we have the impression that the important corps of employees are the full-timers.

[9] The store supervisor is a central office man. In addition to supervising two stores, he has duties with respect

visor and the manager have direct control over the hiring[10] and discharge[11] of employees; the assignment of work to employees; the approval of work schedules for employees; the approval of time off; and, settlement of customer complaints. Vacation schedules are based upon departmental seniority within the store.[12] The time records of employees of the Peabody store are kept and totaled at Peabody, and forwarded to the main office for payroll purposes.[13] There are four Office employees at the Peabody store who perform clerical work for the Peabody store only.[14]

"Other than fresh meat and dairy products[15]

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to the grocery departments throughout the chain. Neither the manager nor the store supervisor have supervision over meat, produce and delicatessen operations, which are controlled by other central office executives.

[10] The extent that this is not so we have already mentioned.

[11] The store supervisor, the central office executive, does "nearly all firing." No firing is done at the local level without at least consultation.

[12] This is only partially true. The seniority system in the sense of establishing length of vacation is company wide. Individual vacation preferences are asserted at the store level on a local seniority basis, but all lists are cleared through the central office, and when vacations require replacement transfers, conflicts are resolved on the basis of company seniority.

[13] The significance of this escapes us. The time records are kept locally only for the current week. The central office makes out the payroll and the pay check of every employee, and accounts for, and keeps records of, all "employment security taxes, withholding taxes, deductions, old age or insurance payments."

[14] If this is of any significance, the correct number is three.

[15] and produce.

almost all other merchandise is ordered by the individual stores, including the Peabody store, directly from independent warehouses and vendors,[16] with the quantity of merchandise ordered left in large degree to the discretion of the individual store management." [17]

The above constitutes the Board's complete findings, except for a finding that in a two-year period there were a total of 118 employee transfers to or from the Peabody store, a matter which apparently particularly troubled counsel for the General Counsel, and troubles us.[18]

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[16] To the extent that this implies that the individual stores have any discretion as to brands, quality of the goods, the prices to pay, what warehouse or vendors to select, or even what goods to carry, it is erroneous. All of these matters are determined by the central office, which also pays all bills. Finally, the initial words "almost all" conceal the fact that it is "very frequent" for merchandise to be transferred from store to store—a fact about which counsel for the General Counsel expressed concern because the Board had indicated "recently that . . . [it] may become very relevant."

[17] Besides determining the particular merchandise, fn. 16, the central office determines the placement, the display and the arrangement of merchandise in every store. Hence the entire meaning of the footnoted phrase is that local management is responsible to see that the shelves do not get empty. The Board's appreciation of the low level of this discretion may be found in its rejection of the claim that Silva was a supervisor, even though this was part of his duties.

[18] Even this finding neglects to mention that some employees regularly divide their basic work week between two or more stores, and that "very frequently" employees work their basic week in one store and overtime in another. It is not clear that the Board's figure included these employees. In any event, the Board failed to note the difference, in the present context, between permanent transfers, and temporary trans-

In addition to what we have stated in the footnotes, the Board omitted to mention the following. All merchandise is sold at uniform prices at all the stores. Special promotional sales are also so conducted. Employee security is handled by a single officer at the central office. All fire, liability and workmen's compensation insurance is contracted for the company as a whole. Finally, and most important, with respect to employees, job classifications, wages, and automatic wage rate steps within each classification, are uniform. So are vacations, holiday, sickness and accident and profit-sharing and retirement programs. There are still further matters, which we find unnecessary to refer to.

Whether because the Board relied upon an inadequate summary of the testimony, or for some other reason, respondent's characterization of its opinion, previously quoted, is unfortunately justified.[19] As we have said, fn. 3, if its summary was thought to be, as it was said to be, a statement of "the relevant facts," it certainly was not. If it was a singling out of those particular facts which, in the Board's opinion, justified treating the Peabody store as a single unit, some of them were so expressed, or limited, as to give the wrong impression, see, *e.g.*, fns. 6, 7, 11, 16; some of them were at

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fers, which latter meant that employees were working in two stores. Exhibit 15 reveals that in the two-year period 50 different employees, excluding supervisors (Exhibit 14), were temporarily in or out of Peabody from or to another store. The regular complement at Peabody was 107.

[19] We say "unfortunately," not only for this case, but because counsel in other cases have, in the past, taken far too much encouragement from our occasional reversals of the Board. There is a heavy burden on parties who seek to claim that the Board's finding are not warranted.

least materially incomplete, see, *e.g.*, fns. 4, 9, 10, 12, 18; and some seem almost totally insignificant, see, *e.g.*, fns. 13, 17. Furthermore, to isolate some facts and omit others, some of them at least comparable, and some of seemingly much greater importance than some mentioned, is, per se, a failure to view even the recited facts in context.

In argument before us counsel seeks to justify the Board's decision by stating that employees who wish to unionize should be permitted to do so. We do not question that. Consideration, however, should also be given to the consequences to employees similarly situated who apparently do not wish to unionize, but who would inevitably be affected, basically, by the union's activities. It is only if it is reasonable to regard the employees elsewhere in the chain differently in the light of the total circumstances that there is a true majority vote. We believe, also, that there should be some minimum consideration given to the employer's side of the picture, the feasibility, and the disruptive effects of piecemeal unionization. Congress' appreciation of these factors we believe is evidenced by its passage of section 9(c)(5) to the effect that the extent of organization is not the sole consideration. *NLRB* v. *Metropolitan Life Ins. Co.*, 1965, 380 U.S. 438.

When the record is viewed as a whole, other than the obvious geographical separation, which is itself by no means complete, in our opinion it would be difficult to find a more integrated operation, or less difference among employees. We take it, however, *NLRB* v. *Metropolitan Life Ins. Co.*, *supra*, that this is not the occasion for us to determine that the Board should not have found the unit appropriate even if we should feel so. We merely decline to enforce its order, and remand for further proceedings.

APPENDIX B

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 1-CA-4644

PURITY FOOD STORES, INC.
(SAV-MORE FOOD STORES)

and

LOCAL 1435, RETAIL CLERKS
INTERNATIONAL ASSOCIATION, AFL-CIO

SUPPLEMENTAL DECISION AND ORDER

On February 3, 1965, the National Labor Relations Board issued its Decision and Order in the above-entitled proceeding,[1] finding that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Charging Union, as collective-bargaining representative of employees at Respondent's retail food market in Peabody, Massachusetts, and by engaging in an unlawful course of conduct designed to undermine the Union's status as majority representative. Thereafter, the Board filed a petition with the United States Court of Appeals for the First Circuit for enforcement of its Order. The Court denied enforcement of the 8(a)(5) portion of said Order and remanded the case solely for consideration of certain factual matters to which the Board's original Decision made no reference and upon which Respondent relies in contending that a single store unit is not appropriate for collective bargaining

[1] 150 NLRB 1523.

herein.[2] Thereafter, briefs were filed by the Respondent, the Charging Union, and the General Counsel.

In the light of the Court's comment that Respondent "is certainly correct" in contending that the Board's initial unit determination "ignores substantial parts of the record, and misstates and misconstrues other parts. . .", the Board has painstakingly reexamined the entire record including the Court's Decision, and the briefs of the parties. In view of the multiplicity of factual issues, their varying significance and clarity, and our disagreement with certain of Respondent's representations of the record, we have set forth in footnotes below, those factual matters which pertain to our findings, pointing up their relative importance to the basic issue before us for determination. Initially, however, it appears appropriate to excerpt fully from Respondent's brief to the Court, the facts upon which Respondent relies in contesting the appropriateness of a single store unit herein.

Specifically, Respondent argues that the administrative structure of its retail food chain reflects centralized control over the seven outlets sufficient to render them "so closely integrated" that "a separation of any one store from the other six for purposes of collective bargaining would be an unreasonable and even capricious disruption of Respondent's business . . ." and would "arbitrarily impose unreasonable obstacles to the management . . . ."[3] As set forth in its brief to the Court, Respondent points to the following facts in support of its position,

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[2] *N.L.R.B.* v. *Purity Food Stores, Inc., (Sav-More Food Stores)*, 354 F. 2d 926 (C.A. 1).

[3] Respondent's Brief to the Court, pp. 17, 20-21.

which facts, unless otherwise indicated, we find to be in accord with the record:

(A) *Respondent's Business*

(1) Respondent is a Massachusetts corporation, having engaged, since 1935, in the operation of a small chain of retail food stores. Respondent now owns and operates seven supermarkets, six of which (including the one at Peabody) are owned in the name of Purity Food Stores, Inc.; the store at Winchester, Massachusetts, was purchased from Converse Supermarket Corp., Respondent having purchased all of the outstanding capital stock at Converse Supermarket Corp. Ownership of the entire chain of 7 stores is equally divided between the brothers Albert S. and Leo Kahn, the officers and directors of the parent Purity Food Stores, Inc., and its wholly-owned subsidiary Converse Supermarket Corp. being the same for both companies. All 7 stores are located North of the City of Boston and within a radius of 30 miles of Respondent's central office at Chelmsford, Massachusetts.

(2) In addition to having its central offices at Chelmsford, Respondent also operates at that location a produce and dairy warehouse. It owns and operates its own trucks and trailers and employs its own drivers.

(3) *Distribution of Merchandise to Stores.* Respondent purchases 90% of its dry groceries from one wholesaler located in Lawrence, Massachusetts, the merchandise being picked up by Respondent's trucks, operated by Respondent's drivers, and being distributed to all 7 stores. Eighty percent of all groceries, 10% of produce

items, and 40% of delicatessen items which are sold in Respondent's stores are distributed and delivered to the stores by Respondent's own trucks.

(4) *Integrated Operations.* The record establishes the following facts as indicative of the high degree to which the operations of Respondent's seven stores are integrated:

(a) Respondent's central office determines what merchandise shall be handled at its stores, how such stock shall be displayed, and the uniform prices at which merchandise is to be sold throughout the chain. Promotional sales, when held, take place uniformly in all 7 stores.

(b) All merchandise is purchased by Respondent's central office. To the extent that certain merchandise is delivered to the stores by so-called vendors, such procedure involves, at most, a simple ministerial act of *ordering* by the individual stores as distinguished from actual *purchasing.* [But see ftn. 11, *infra.*] All vendors are selected by Respondent's central office executives who negotiate the prices to be paid vendors, and store personnel are not aware of the prices paid to the vendors. All vendors are paid directly from Respondent's central office.

(c) Respondent's Chelmsford office maintains detailed records of operations of all 7 stores, and apart from the time cards being used in the current workweek, all personnel records are maintained at the central office. At the end of each workweek, time cards from all 7 stores are sent to Chelmsford.

(d) Radio advertisements and some newspaper advertisements identify the locations of all 7 stores. [See ftn. 6, *infra.*]

(e) Respondent assigns to certain central office executives responsibility for purchasing certain categories of merchandise (viz., groceries, meats, etc.) for all 7 stores; and the executive having responsibility for purchasing such a category of merchandise is also given the responsibility for supervising, in all 7 stores, those departments handling his particular category of merchandise. [But see ftn. 15, *infra.*] These executives spend part of their time in Respondent's Chelmsford office and part of their time at the various stores. Certain central office executives, in addition to the foregoing chain-wide duties, are assigned overall responsibility for the operation of a specific store. Thus, Mr. Goggin is responsible for buying groceries for all 7 stores, is responsible for operation of the grocery departments in all 7 stores, and has overall responsibility for the operations of the stores at Peabody and Billerica. When the chain executive is absent from the store for which he has overall responsibility, the so-called store manager assumes responsibility for only certain portions of the store, while the other departments in that store are controlled by the other central office executives. [But see ftn. 15, *infra.*] A close and continuing liaison between the central office and the seven stores, and as between stores, is maintained, Respondent's telephone expenditures being about $1500 monthly.

(f) Respondent contracts with outside contractors who perform, respectively, all refrigeration maintenance work, all electrical work, and all laundering of uniforms for all 7 stores.

(g) Employees in certain departments of the stores (i.e., meat, produce, and delicatessen) are hired by those Chelmsford executives having responsibility for purchasing and merchandising those products for the chain. While some full-time grocery clerks are hired, at the store, by the Chelmsford executive having overall responsibility for the particular store, other full-time grocery clerks are hired at the Chelmsford office. [But see ftn. 8, *infra.*] Some part-time employees are hired by the store manager, but most are hired by the Chelmsford executive responsible for that store. [But see ftn. 8, *infra.*] All cashiers are trained by Mrs. Rose, a central office official, and Mrs. Rose determines, after a trial period, whether a cashier is to be retained. Uniform employment application forms are supplied to all 7 stores. All new employees receive the Company's employee manual. Almost all firing is handled by the central office executive responsible for the particular store, and no discharges are effected without consultation with that executive. [But see ftn. 12, *infra.*]

(h) Respondent's President determines the hours during which each store is to be open for business, and the number of employees to be employed in each store is based upon a chain-wide formula which is applied by Respondent's central office. [But see ftn. 9, *infra.*]

(i) Day-to-day control of each of the stores is vested in and exercised by a number of Respondent's central office executives. [But see ftn. 15, *infra.*] A single security officer working out of the Chelmsford office handles cases of employee dishonesty for all stores.

(j) The daily receipts from all 7 stores are transferred to Respondent's general corporate account at a bank in Lowell, Massachusetts. [But see ftn. 7, *infra.*] Employees in all stores are paid by checks prepared by the central office. Unemployment, withholding, and Social Security taxes are handled on a chain basis at the Chelmsford office. Insurance policies providing workmen's compensation coverage, fire, and liability coverage are applicable to the chain as a whole. An annual outing is open to all employees of the chain, and Respondent publishes an employee newspaper which is distributed to the employees in all stores.

(k) Respondent's established system of job classifications and wage rate ranges apply uniformly in all seven stores. General wage increases, when granted, are applied to the employees in all stores.

(l) Respondent provides its full-time employees with paid vacations, paid holidays, weekly sickness and accident insurance benefits, paid sick leave benefits, Blue Cross and Blue Shield benefits, and a profit sharing-retirement plan, and all of which policies are applied uniformly in the 7 stores.

Part-time employees, who work 15 hours or more per week, are eligible for paid vacations and paid holidays, but part-time employees who work less than 15 hours weekly do not receive either vacation pay or holiday pay. No part-time employees receive any of the fringe benefits other than vacations and holidays.

(m) Paid vacations are based on the individual employee's continuous length of service (i.e., seniority) in the employ of Respondent as a whole. Vacation schedules for the employees in all 7 stores are subject to review and changes by Respondent's central office.

(n) There is frequent and continuing transfer of merchandise between the stores. From October 1962 to May 1964, there were 162,311 units of groceries transferred between the stores.

(o) Respondent employs approximately 400 employees in its chain. There have been numerous transfers (temporary and permanent) from one to another of the 7 stores, generally for the convenience of Respondent's business. [But see ftn. 16, *infra.*] In the 2-year period from June 1962 to May 30, 1964, there was a total of 557 employee transfers, 118 transfers being into or out of the Peabody store.

Some employees regularly divide their normal workweek between two stores, and frequently an employee, in addition to performing his normal workweek in one store, works overtime in another store. In all such cases, the employee dividing his time between stores is paid by a single check issued by Respondent's Chelmsford office.

(p) In the week ending August 29, 1964, Respondent gave a general wage increase to the employees in all 7 of its stores. This increase was the same as the wage increase which, shortly before August 1964, was negotiated between the Retail Clerks International Association and other chains such as The First National Stores and

Stop & Shop. In all the years it has been in business, Respondent has given its employees the same general increases as have been given by those other chains.

(5) *Workforce in Peabody Store.* During the period relevant to this proceeding, there were 108 employees in the Peabody store, of which number 32 were part-time employees who normally and regularly work less than 15 hours weekly. [But see ftn. 8, *infra.*]

We agree with Respondent that the record fairly construed reveals that operation of its various stores is accomplished through a substantial degree of centralized control. And, as we are mindful that unit findings should not ignore the desirability of accommodating the opportunity of employees to engage in collective bargaining with the impact of single store bargaining upon management's ability to run its business, we are in complete agreement with the observation of the Court of Appeals herein that "there should be some . . . consideration given to the employer's side of the picture, the feasibility, and the disruptive effects of piecemeal unionization." [4]

Significantly, however, we are not here confronted with a multi-facility operation, so integrated that separation of one store from the others for purposes of collective bargaining would, as Respondent contends, obstruct centralized control and effective operation of the chain. Thus, the Peabody store is not dissimilar from the traditional retail chain outlet insofar as it functions as a distinct economic unit within Respondent's overall operations. Being located about 30 miles from Chelmsford, and about 10 miles from the

[4] *N.L.R.B.* v. *Purity Food Stores, Inc. (Sav-More Food Stores), supra,* p. 931.

next nearest of Respondent's remaining stores, it is separated geographically and serves a different trade area from Respondent's other facilities. The employee complement of that store constitutes about 25 percent of the total number of Respondent's employees. The varied store hours [5] and local advertising campaigns,[6] as well as separate accounting procedures,[7] attest to the economic independence of Peabody from the other outlets. As is customary in any chain operation, employees at each store perform parallel, as distinguished from integrated, functions, with the success or failure of one store in no way determinative of the effectiveness of day-to-day operations at any other store. That the Peabody store possesses substantial autonomy both with respect to normal operational matters and the local implementation of chainwide policy is evidenced by the degree of in-store hiring [8] and the store's internal responsibilities

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[5] The record shows that store hours are set by the central office but vary in at least some of the stores. This is apparently a reflection of local market conditions.

[6] In addition to Respondent's chainwide advertising campaigns, it also utilizes local communication media for sales promotion within the immediate trade area served by a particular store.

[7] Office clericals employed by Peabody tabulate daily receipts of that store, and reconcile them against register tallies. Daily receipts are then deposited in a separate branch depository before remittance to a chainwide account. Those clericals also prepare employee time cards for submission to the central office.

At the Chelmsford office, separate books are maintained on each store, with each having its own profit and loss statement.

[8] Although testimony concerning general policy of the chain indicates that meat, delicatessen, and produce employees are

for scheduling work,[9] all handling of customer complaints, ordering,[10] some purchasing,[11] and discipline.[12]

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hired centrally, specific testimony of Edward Goggins with respect to the Peabody store shows that, of about 107 employees at Peabody, all part-timers are hired at the store, and only 3 or 4 full-time employees were hired centrally and referred to that store.

[9] Athough weekly-man hours for a particular store are estimated from a formula based on expected volume of business which is prepared by the central office, the decision as to how the weekly man hours will be distributed between part-time and full-time employees is made at the store level. Thus, after the allowable weekly hours are furnished to the department heads, each prepares a schedule of employees to work in his respective department, which is then submitted, at the Peabody store, for approval of either Goggins or the in-store manager. In Goggins' absence the in-store manager will approve the schedules.

[10] Although purchasing of meat, produce, delicatessen, and some groceries is done centrally, all ordering originates with the individual stores. In addition to groceries, the record plainly reveals that ordering of meat, produce, and delicatessen is accomplished by periodic discussion, generally by telephone, between the in-store department manager and the executive responsible for the particular product line.

[11] The record shows that individual store management is authorized to purchase certain products from an approved list of vendors. We cannot agree with Respondent that this purchasing constitutes "a simple ministerial act of ordering". The discretion exercised by local store management as to the quantities purshased, and hence the extent to which Respondent's credit may be pledged, involves considerable responsibility and could reflect upon the economic success of the particular store. Accordingly, the fact that prices are negotiated centrally and that Respondent is billed centrally does not negate this form of local purchasing authority.

[12] The in-store manager, in the absence of the executive

In our opinion, the foregoing amply demonstrates that the Peabody store, which as a retail outlet is the analogue of the industrial plant,[13] possesses significant autonomy within Respondent's overall operation, ". . . is composed of employees closely and distinctly related in location and function, and is inherently apt for bargaining purposes." [14] The Peabody store employees regularly work together and have common interests in relation to their Employer, some of which are separate and apart from those of employees in other locations. The freedom of choice of this one cohesive group of employees to have or not to have a bargaining representative should not be dependent upon the interest or lack of interest in such representation on the part of other employees in separated, and in this case somewhat distant, retail chain outlets serving other markets in a populous area. As heretofore indicated, there is a substantial amount of hiring done at the Peabody store and of autonomy in the direction of day-to-day operations, reflecting the Respondent's own allocation of distinct responsibilities there. Nevertheless, Respondent claims that the appropriateness of that unit is overcome by the other factors set forth above, which assertedly establish that single store bargaining would be arbitrary and impede management's ability to run its business. We

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responsible for his store, has authority to discharge employees. Although there is general testimony that chainwide policy requires consultation with executives over discharges, the more specific testimony of executive and Peabody store supervisor Goggins discloses that the Peabody store manager can discharge an employee in his absence.

[13] *Metropolitan Life Insurance Company, (Woonsocket R. I.)*, 156 NLRB No. 113, p. 9.

[14] *N.L.R.B.* v. *Sun Drug Co.*, 359 F. 2d 408, 413 (C.A. 3).

disagree. Respondent's contention is essentially premised upon the administrative structure of the chain, which does reflect a large degree of centralized control, including delegation of authority over individual store operations to dual function executives. With respect to the latter, we are not persuaded that the autonomy of the Peabody store is compromised by the fact that in-store managers and department heads—the highest level, full-time representatives of management within the stores—are subordinate to central office executives in the operation of Respondent's various outlets.[15] For the status of a chain store as a distinct economic unit does not depend upon the identity of the individual, within a particular line of administration, who is responsible for exercising store level authority, but upon the fact that decisions, which have no relevance to other stores, are and must be made concerning independent operations of a particular store.

At the same time, the degree of centralized management evidenced herein does not alter the separate

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[15] Although the record is far from clear with respect to the extent to which the executives actually participate in normal operation of stores within their formal supervisory control, we shall assume, for purposes of the instant case, that Goggins, whose chainwide responsibilities would appear far more time consuming than his activities in connection with Peabody, nevertheless is actively engaged in day-to-day supervision of that store. However, we reject Respondent's factual assertion that Goggins and other central office executives actively supervise day-to-day activities of their respective departments in all seven stores. Although the record includes testimony to this effect, it strains credulity to conclude that the executives, rather than the store manager and department heads, are, in addition to their other duties, actively engaged in hour-by-hour or day-by-day supervision of the various departments throughout the chain.

economic identity of the Peabody store. Such control is not to be confused or equated with the degree of interrelationship of operations effective to merge a single establishment into a more comprehensive unit hence defeating the individual identity of that facility.[16] In the retail industry centralized control and multi-store supervision is a common attribute of any chain operation. Consistent with this fact, our decision in *Sav-On Drugs, Inc.*,[17] which reversed the prior rule that the appropriate unit in retail chain operations *must* embrace employees in all stores within an employer's administrative or geographical area, clearly indicates that administrative control is not to be regarded as conculsive in determining the appropriate

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[16] See, e.g., *Dixie Belle Mills, Inc.*, 139 NLRB 629, 631. Respondent points to its practice of interchanging merchandise and personnel between the various stores as defeating the appropriateness of the single store unit herein. However, neither factor, considered independently or in conjunction with others established on this record, necessitates such a result herein. It is our opinion that the interstore transfer of merchandise and personnel interchange (which as found in our previous decision represented an average of about one transfer per week in a unit with an excess of 100 employees), fails to reflect the degree of operational integration necessary to defeat either the separate identity of the Peabody store, or its inherent appropriateness as a bargaining unit. Cf. *Black & Decker Mfg. Co.*, 147 NLRB 825. Moreover, the weight to be assigned to employee interchange as a reliable measure of actual, functional integration is lessened where, as here, the Employer has engaged in an unlawful campaign to undermine the designated bargaining representative and the evidence concerning the incidence of interchange appear limited to that which occurred after the Employer acquired knowledge of the Union's organizational interest.

[17] 138 NLRB 1032. See also *Walgreen Company*, 114 NLRB 1168, 1169.

unit in this industry. Thus, in speaking of the prior policy, we stated:

> . . . Reviewing our experience under that policy we believe that too [frequently] it has operated to impede the exercise by employees in retail chain operations of their rights to self-organization guaranteed in Section 7 of the Act. In our opinion that policy has overemphasized the administrative grouping of merchandising outlets at the expense of factors such as geographic separation of the several outlets and the local managerial autonomy of the separate outlets; and it has ignored completely as a factor the extent to which the claiming labor organization had sought to organize the employees of the retail chain. We have decided to modify this policy and to apply to retail chain operations the same unit policy which we apply to multiplant enterprises in general. Therefore, whether a proposed unit which is confined to one of two or more retail establishments making up an employer's retail chain is appropriate will be determined in the light of all the circumstances of the case [footnotes omitted].[18]

In the instant case, we are satisfied that bargaining limited to the Peabody store, which as previously indicated constitutes a distinct, self-contained economic unit, will neither preclude Respondent's continued reliance upon centralized policy determinations, defeat its practice of utilizing central office executives to oversee day-to-day store operations, nor otherwise impair effective management of the chain. It is also noteworthy in this connection that the impact of any

[18] *Ibid*, p. 1033.

labor dispute at the Peabody store is not likely to be felt at Respondent's other outlets which serve different markets.[19] In our judgment, the institution of localized bargaining on behalf of the separate, identifiable group of Peabody employees, involving, *inter alia*, such matters as the establishment and administration of local work rules, grievance protections, vacation programs, seniority, and pension rights, as well as the setting of wage rates,[20] is not only entirely feasible, but would not unduly encroach on the Employer's various administrative controls. In these circumstances, it is our opinion that to regard Respondent's administrative structure as defeating the appropriateness of the single store unit would artificially disadvantage the organizational interests of these and other chainstore employees, simply because their employer operates a chain rather than a single-store enterprise. Additionally, in view of the substantial autonomy, nonintegrated nature, and geographic separation of the Peabody store, it is our opinion that to view Respondent's administrative organization as controlling herein would not only undermine the considerations basic to our decision in *Sav-On Drugs, Inc., supra*,[21] but would vest the chain operator with absolute power alone to control the scope of the appropriate unit contrary to the statutory scheme which entrusts the Board with such responsibility.

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[19] This is not to suggest, however, that the potentiality or want thereof, of such an impact on other unorganized stores would in itself be a controlling factor in determining separate unit appropriateness.

[20] Indeed, on wage rates (see Respondent's contention, p. 6 herein) the Employer asserts that it already adheres to wage levels worked out by competing chains in agreements with Petitioner's international union.

[21] See footnote 18 herein.

Nor can we adopt the suggestion that a single-store unit would be based on extent of organization and that the Board is precluded under Section 9(c)(5) of the Act [22] from finding that unit appropriate. In the words of the Supreme Court: ". . . both the language and legislative history of 9(c)(5) demonstrate that the provision was not intended to prohibit the Board from considering the extent of organization as one factor, though not the controlling factor in its unit determination".[23] Stated otherwise, that Section was merely intended to preclude a unit determination based solely upon extent of organization, where other relevant criteria of appropriateness are absent. It was not intended to invalidate units, which, as here, qualify under other tests of appropriateness. Thus, in the instant case, in addition to the absence of a bargaining history and the fact that no labor organization is seeking a broader unit, we have found that the Peabody store is not functionally integrated with others of Respondent's outlets and that it constitutes a geographically separate and functionally distinct economic unit "inherently apt" for bargaining purposes. In such a context, it seems obvious to us that the unit found appropriate herein conforms fully with the mandate of Section 9(c)(5) of the Act.[24]

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[22] Section 9(c)(5) provides:

> In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

[23] *N.L.R.B.* v. *Metropolitan Life Insurance Company*, 380 U.S. 438, 441-442.

[24] The fact that the Union, having previously petitioned for a broader unit of Respondent's employees, may now be motivated by the extent to which it has organized in seeking the smaller unit is immaterial so long as the Board in making its

For these reasons, we are constrained to adhere to our initial determination that all full-time and regular part-time employees of Respondent employed at its Peabody store, excluding casual employees, guards, and supervisors as defined in the Act, constitute an appropriate bargaining unit herein. We wish further to note that a single-store unit in a retail chain operation may not fairly be characterized as an arbitrary and piecemeal grouping; for, it generally constitutes the basic appropriate unit for chainstore employees, and is equivalent to the "plant unit", which is presumptively appropriate under Section 9(b) of the Act. Thus, we have consistently upheld the appropriateness of such a unit where sought.[25] This is not to say, however, that these unit determinations give rise to an absolute rule that the single-store unit constitutes the appropriate basis for collective bargaining in every chain operation. But, having held in the instant case that the Peabody store possesses sufficient attributes of autonomy to be presumptively appropriate and that

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determination does not give controlling weight to that fact. *Allied Stores of New York, Inc.*, 150 NLRB No. 79; *Metropolitan Life Insurance Company, (Woonsocket, R.I.)*, 156 NLRB No. 113, footnote 20.

Also note *The Wm. H. Block Company*, 151 NLRB 318, in which the Board reaffirmed its view "that the Act does not compel a labor organization to seek representation in the most comprehensive grouping unless such grouping constitutes the *only* appropriate unit."

[25] See, e.g., *Primrose Super Market of Salem, Inc.*, 148 NLRB 610, 613-617, enfd. by First Circuit, unreported, cert. denied 382 U.S. 830; *Winn-Dixie Stores, Inc.*, 143 NLRB 848, 860-861, enfd. 341 F. 2d 750 (C.A. 5); *Merner Lumber and Hardware Company*, 145 NLRB 1024, 1025-1026, enfd. 345 F. 2d 770 (C.A. 9); *The H.L. Hudson Co.*, 155 NLRB No. 133; *Sun Drug Co., Inc.*, 147 NLRB 669, enfd. 359 F. 2d 408 (C.A. 3).

said presumption has not been rebutted herein, it is unnecessary, for purposes of this case, for us to explore the degree of integration necessary to require a more comprehensive grouping as the minimal appropriate bargaining unit. Instead, that question will be left to future consideration on a case-by-case basis. Accordingly, we reaffirm our previous findings that Respondent engaged in unfair labor practices by, *inter alia*, failing to recognize and bargain with the Union as majority representative of employees in that unit.

SUPPLEMENTAL ORDER

In view of the foregoing, and on the basis of the record as a whole, the National Labor Relations Board reaffirms its Order of February 3, 1965, in this proceeding.

Dated, Washington, D. C.

FRANK W. MCCULLOCH, Chairman

JOHN H. FANNING, Member

GERALD A. BROWN, Member

HOWARD JENKINS, JR., Member

SAM ZAGORIA, Member

National Labor Relations Board

(SEAL)

APPENDIX C

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 6582

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

PURITY FOOD STORES, INC.
(SAV-MORE FOOD STORES), RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board

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ALDRICH, *Chief Judge*, WOODBURY,* *Senior Circuit Judge*, and COFFIN, *Circuit Judge*.

May 8, 1967

WOODBURY, *Senior Circuit Judge*. This court on a previous petition for enforcement affirmed the Board's findings that the respondent had improperly interefered with its employees' efforts to organize by surveillance and overly hostile anti-union talk in violation of § 8(a)(1) of the Labor Management Relations Act, 1947, 29 U.S.C. § 158(a)(1). But the

* Sitting by designation.

court was dissatisfied with the Board's determination that only the Peabody store in the respondent's supermarket chain constituted an appropriate collective bargaining unit. Wherefore the court declined to enforce the Board's order to bargain collectively as required by § 8(a)(5) of the Act and remanded to the Board for further proceedings. *NLRB* v. *Purity Food Stores, Inc.*, 354 F.2d 926 (C.A. 1, 1965). The Board, in spite of this court's statement that "in our opinion it would be difficult to find a more integrated operation, or less difference among employees," nevertheless, in a supplemental decision and order, reaffirmed its previous determination that the respondent's Peabody store constituted an appropriate collective bargaining unit and has again petitioned for enforcement.

The respondent operates a chain of 7 supermarkets in Massachusetts. All stores are located north of Boston and all are within a 30-mile radius of the respondent's central office in Chelmsford. All stores are located in relatively small communities, the largest being Peabody with a population as of the 1960 federal census of 32,202.

On May 13 and 14, 1964, a majority of the full and regular part-time employees at the respondent's Peabody market signed cards requesting representation by Local 1435, Retail Clerks International Association, AFL-CIO. No effort was made at that time to organize the clerks at any of the other 6 markets in the chain. The sole question here is whether the employees at that market constitute an appropriate collective bargaining unit.

In its supplemental decision the Board made more specific and detailed findings of fact than it vouchsafed in its original decision. It found, as the evidence clearly requires, that the respondent's mer-

chandising practices are highly centralized. Specifically, the Board found substantially as follows: The respondent's central office determines the merchandise to be sold in the stores, how the stock shall be displayed and fixes uniform sales prices throughout the chain. Promotional sales, when held, take place uniformly in all seven stores. All merchandise is purchased and paid for by the respondent's central office. All vendors are selected by central office executives who negotiate prices which are not disclosed to local store managers. Except for purely local news media, such as newspapers with only a local circulation, all radio advertising and advertising in Boston metropolitan newspapers identify the locations of all seven stores. Local store managers have the responsibility of keeping the shelves in their stores stocked. To accomplish this they have authority to order goods from the vendors selected by the central office[1] and to transfer stock from store to store as required which, the Board found, "is frequent and continuing." From October, 1962, to May, 1964, 162,311 units of groceries were transferred between stores.

Administratively the respondent's operation is also centralized. Certain central office executives are assigned responsibility for purchasing specific cate-

[1] We are not impressed by the Board's attempt in a footnote to intimate that this authority indicates substantial local autonomy by characterising it as authority to "purchase," and by suggesting that it involves power to pledge the respondent's credit to an extent sufficient to "reflect upon the economic success of a particular store." Should a local store consistently over-stock an item, the situation to the extent not corrected by transfer to another store would certainly be corrected by the central office executive in charge of the store under the administrative procedures to be considered presently.

gories of merchandise, such as meats, groceries, produce, etc. for all seven stores, and each such executive has responsibility for supervising his category of merchandise in all seven stores.

In addition to his chain-wide duties each executive also is assigned over-all responsibility for the operation of a specific store or stores. Thus one Goggins, the executive responsible for buying groceries for all stores and for the grocery departments in all stores, has over-all responsibility for the respondent's stores in Peabody and Billerica. He therefore spends part of his time in the central office and part of his time in the various stores with the major part of his out-of-office time in the two stores in his particular charge.[2] The Board found that respondent's telephone expense of about $1,500 per month showed a "close and continuing liaison" between the stores and between the stores and the central office.

Daily receipts from all seven stores are transferred to the respondent's general bank account. Employee security is handled by a single officer at the central office. Insurance of every kind is contracted for centrally and is applicable to the chain as a whole. All refrigeration maintenance work, electrical work and laundering of uniforms is done for all stores under contracts with outside contractors.

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[2] The Board in another footnote conceded that Goggins "is actively engaged in day-to-day supervision" of the Peabody store. However, it rejected the respondent's assertion that he and the other central office executives actively supervised the day-to-day activities in their respective departments in all seven stores. It said that although there was testimony to that effect, "it strains credulity to conclude that the executives, rather than the store manager and department heads, are, in addition to their other duties, actively engaged in hour-by-hour or day-by-day supervision of the various departments throught the chain."

Finally, and of primary significance, the respondent's personnel practices and procedures are also both centralized and integrated. The Board found that employees in certain departments (*i.e.*, meat, produce and delicatessen), are hired by the central office executives responsible for purchasing and merchandising those products for the chain. Some full-time grocery clerks are hired at the store by the central office executive having over-all charge of the store, and others are hired at the central office in Chelmsford and assigned to whatever store may be shorthanded. Some part-time employees are hired by the local store managers but most of them are hired by the central office executive responsible for the store. In a footnote appended to those findings the Board noted that although there was testimony showing a general policy of central hiring of meat, delicatessen and produce employees for the chain, specific testimony showed that of about 107 employees at the Peabody store "all part-timers are hired at the store, and only 3 or 4 full-time employees were hired centrally and referred to that store." The significance of the place of hiring escapes us. What is significant is that employees are not hired by local store managers, except apparently for a few casual part-timers, but are hired by central office executives.

All cashiers are hired and trained by a central office executive who determines after a trial period whether a cashier is to be retained in employment. All employment is effectuated on the basis of uniform application forms prepared by the central office, and all new employees are given the company's employee manual. Almost all firing is handled by the central office executive in charge of the particular store involved, or at least after consultation with him. The testimony is that local store managers may discharge

on their own responsibility only for "some outrageous activity."

At the end of each week time cards are sent from all stores to the central office where all personnel records are kept and from which all pay checks are issued. Job classifications and wage rates in each classification apply uniformly in all stores. General wage increases, when granted, apply to the employees in all stores. Fringe benefits such as paid vacations and holidays, sickness and accident insurance benefits, Blue Cross and Blue Shield and a profit-sharing retirement plan apply uniformly in all stores. Paid vacations are based on the individual employee's continuous employment in the chain and when two employees in the same category in the same store apply for the same vacation period, the central office gives first choice to the employee with the greater chain-wide seniority.

There are approximately 400 employees in the respondent's chain and there have been "numerous transfers," both temporary and permanent, from one to another of the seven stores, usually for the respondent's business convenience. During the two year period from June 1962 to May 30, 1964, there were 557 transfers, 118 being in to and out of the Peabody store. Moreover, some employees regularly divide their normal work week between two stores, and frequently an employee, in addition to working his normal work week in one store, works overtime in another. In all such cases the employee is paid by a single check issued from respondent's central office.

The Board said that it agreed with the respondent "that the record fairly construed reveals that operation of its various stores is accomplished through a substantial degree of centralized control." And it said that it was "mindful" that unit findings ought not to

ignore the desirability of accommodating the opportunity of employees to organize with management's ability to run its business and that it was in "complete agreement" with this court's statement in its earlier opinion that "there should be some . . . consideration given to the employer's side of the picture, the feasibility, and the disruptive effects of piecemeal unionization." Nevertheless the Board reaffirmed its previous determination that the Peabody store alone constituted an appropriate unit for bargaining.

The Board rested its conclusion basically on lack of store-wide bargaining history [3] and on its view that the Peabody store was so economically independent of the other retail stores and possessed such "significant autonomy" within the respondent's over-all operation that separation of that store from the others for purposes of collective bargaining would not obstruct centralized control and effective operation of the chain. We cannot agree. It seems to us obvious that in view of the frequent interchange of employees from store to store, either permanently or for part-time work, only friction between employees and chaos in labor relations could possibly result if some employees were under union rules as to wages, hours, seniority, grievance procedures, etc. when the employees working beside them in the same category were not. The Board's conclusion to the contrary flies in the face of reality.

The evidence and the Board's specific findings based thereon disclose a small, compact, homogeneous, centralized and integrated operation. The findings now made confirm this court's previous view that "it would be difficult to find a more integrated operation,

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[3] This is true so far as it goes but it does not mention the failure of the Union to organize the stores in a consent chain-wide election in 1961.

or less difference among employees." Under some circumstances a single store in a retail chain may constitute an appropriate bargaining unit. But on the evidence and findings in this case we can see no rational basis for fractionating the respondent's organization for purposes of collective bargaining.[4]

We do not lightly disagree with the Board in matters of unit determination. We are not unaware of the difficulties involved in making unit determinations which will "assure to employees the fullest freedom" in exercising their right to organize as required by § 9(b) of the Act without running afoul of § 9(c)(5) of the Act forbidding the Board to treat the extent to which employees have organized as "controlling." And we recognize the particular difficulties involved in making unit determinations in the retail chain store industry which will protect employees' statutory rights while at the same time giving the employer reasonably adequate protection from the "disruptive effects of piecemeal unionization" to quote this court's previous opinion. See 79 Harv. L. Rev. 811. Nor are we unaware that § 9(b) of the Act confers broad discretion on the Board in unit determination and that its determinations invoke "of necessity a large measure of informed discretion, and the decision of the Board, if not final, is rarely to be disturbed." *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, 491 (1947).

Nevertheless the Board must articulate substantial reasons for its unit determinations. *NLRB* v. *Metro-*

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[4] *NLRB* v. *Sun Drug Co., Inc.*, 359 F.2d 408 (C.A. 3, 1966), upon which the Board relies, is clearly distinguishable on its facts for in that case there was only strictly limited transfer of employees from store to store, and local store managers had much broader authority including authority to purchase some items and to hire and fire employees.

politan Life Insurance Co., 380 U.S. 438 (1965). No such reasons have been offered. The "independence" of the stores in the Purity chain amounts to no more than a few miles of physical separation and the consequent division of a few ministerial responsibilities. This is far from enough. *NLRB* v. *Frisch's Big Boy Ill-Mar, Inc.*, 356 F.2d 895 (C.A. 7, 1966). The Board's simple declaration that single store units are considered "presumptively appropriate" adds nothing, especially since the Board declared as recently as 1963 that "*the* appropriate bargaining unit in retail chain operations should embrace the employees of all stores within an employer's administrative or geographical area." *Weis Markets, Inc.*, 142 NLRB, 708, 710 (emphasis added). To be sure the selection of an appropriate bargaining unit gives the majority of employees within that unit the bargaining representative they desire. But this selection may also affect the employer, employees excluded from the unit but affected by the selection, and minority employees within the selected unit.

We must always bear in mind that § 10(e) of the Act clothes the courts of appeals with authority to enter decrees "enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board." We have a statutory duty to perform in the premises and when, as here, we are unable to avoid the conclusion that the Board's unit determination simply does not square with its specific findings, we would not perform our statutory function should we enforce.

A decree will be entered setting aside the order of the Board.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6582

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

PURITY FOOD STORES, INC., Etc., RESPONDENT

DECREE

May 8, 1967.

This cause came on for further hearing, and upon subsequent petition for enforcement of the supplemental order upon remand of the National Labor Relations Board, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the National Labor Relations Board of February 3, 1965, and the supplemental order of August 26, 1966, are set aside.

By the Court:

/s/ ROGER A. STINCHFIELD
Clerk.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6582

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

PURITY FOOD STORES, INC., Etc., RESPONDENT

REVISED DECREE.

May 10, 1967.

The decree of this Court of May 8, 1967 is hereby vacated.

This cause came on for further hearing upon the subsequent petition for enforcement of the order of the National Labor Relations Board, dated February 3, 1965, as reaffirmed by the Board, following remand, on August 26, 1966, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: the order of the National Labor Relations Board of February 3, 1965, is hereby affirmed and enforced, with the exception of paragraphs 1(a) and (b), and 2(a) and (b). The foregoing excepted paragraphs are set aside.

Further, the order of February 3, 1965, shall be supplemented by a requirement for the posting of a notice in the usual manner as to the portions of that order which are hereby affirmed and enforced.

By the Court:

/s/ ROGER A. STINCHFIELD
Clerk.

APPENDIX D

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * *

Sec. 9 (b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both

professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

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No. 575

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In the Supreme Court of the United States

OCTOBER TERM, 1967

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,

v.

PURITY FOOD STORES, INC.
(SAV-MORE FOOD STORES),
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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PURITY FOOD STORES, INC.
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RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the court of appeals (Petition, pages 48-56) is reported at 376 F.2d 497; the court's prior opinion is reported at 354 F.2d 926 (Petition, pp. 20-28). The original Decision and Order of the National Labor Relations Board (J.A. 310-332)[1] is reported at 150 NLRB 1523; the Board's Supplemental Decision and Order (Petition pp. 29-47) is reported at 160 NLRB No. 53.

[1] "J.A." refers to the Joint Record Appendix in the court of appeals. References to exhibits of respondent are sometimes designated "R. Ex.".

Jurisdiction

The revised decree of the court of appeals was entered on May 10, 1967 (Petition, p. 58). On August 1, 1967, Mr. Justice Fortas extended the time for filing a petition for a writ of certiorari to and including September 5, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1245(1) and Section 10(e) of the National Labor Relations Act (29 U.S.C. 160(e)), hereinafter sometimes referred to as the "Act".

Statute Involved

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.) are printed in Appendix A, *infra,* (pp. 26-29).

Questions Presented

Whether the decision of the National Labor Relations Board is supported by substantial evidence on the record considered as a whole.

(A) WHETHER A UNIT LIMITED TO THE RESPONDENT'S PEABODY, MASSACHUSETTS STORE IS INAPPROPRIATE FOR COLLECTIVE BARGAINING PURPOSES.

(B) WHETHER THE DECISION OF THE COURT BELOW, IN SETTING ASIDE THAT PART OF THE BOARD'S ORDER REQUIRING RESPONDENT TO RECOGNIZE AND BARGAIN WITH THE CHARGING LABOR ORGANIZATION, WAS CONSISTENT WITH THE PROPER SCOPE OF JUDICIAL REVIEW.

Statement

(A) *The Original Decisions.* In its first decision, issued on February 3, 1965, the Board found that Local 1435, Retail Clerks International Association, AFL-CIO, represented a majority of the employees employed at respondent's Peabody, Massachusetts retail food store; that the Peabody store was an appropriate unit for collective bar-

gaining; that the respondent had committed certain acts which were violative of Section 8(a)(1) of the Act; and that respondent had violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the union as representative of the employees in that unit (J.A. 314-320). On review of the Board's order directing respondent to bargain with the union, the court of appeals expressed its concurrence with respondent's charge that the Board's finding "ignores substantial parts of the record, and misstates and misconstrues other parts. . . ."[2] in making its unit determination. The court of appeals remanded the proceeding to the Board for further consideration of the unit question and particularly with respect to respondent's contention that the only appropriate unit in this case was a unit comprising the employees in the respondent's chain of seven retail supermarkets, 354 F.2d 926.[3] The circuit court's decision was issued on December 30, 1965.

(B) *The Board's Decision Following Remand.* Some 8 months later, that is, on August 26, 1966, the Board issued its Supplemental Decision and Order,[4] in which it stated that it had "painstakingly reexamined the entire record including the Court's Decision, and the briefs of the parties", and that "on the basis of the record as a whole, the National Labor Relations Board reaffirms its Order of February 3, 1965, in this proceeding."[5] Upon reviewing the case again, the circuit court stated that ". . . on the evidence and findings in this case we can see no rational basis for fractionating the respondent's organization for purposes of collective bargaining."[6] The court held the

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[2] Petition, pp. 22-23.
[3] Id., pp. 20-28.
[4] Id., pp. 29-47.
[5] Id., pp. 30, 47.
[6] Id., p. 55.

single store unit in this case to be inappropriate and set aside the Section 8(a)(5) findings of the Board.

(C) *The Facts.* The evidence taken at the hearing of the unfair labor practice case established the following facts:

Respondent is a Massachusetts corporation, engaged in the operation of a small chain of seven retail food stores (J.A. 109), all of the stores being located north of the City of Boston and within 30 miles of respondent's central office at Chelmsford, Massachusetts (J.A. 111-112; R. Ex. 1).

In the respondent's stores, including the Peabody store, individual store managers do not have autonomy and are not in charge of the day-to-day operations in their respective stores; the day-to-day operations are controlled by a number of central office executives who, in the truest sense, are responsible for all purchasing in all seven stores (J.A. 124-125, 131-141, 154-155, 263-266); respondent's central office determines what merchandise shall be handled at its stores and the uniform prices at which merchandise is to be sold throughout the chain (J.A. 132-134, 140-142, 146-148); central office executives have the full responsibility for merchandising certain product lines in all 7 stores (J.A. 133-134); central office executives, who exercise certain functions, such as purchasing and merchandising, on a chain-wide basis, are assigned overall responsibility for the operations of specific stores, and literally divide their time between respondent's central office and the stores for which they have such overall responsibility (J.A. 118-119, 150-151, 211-212); there is substantial and continuing interchange of merchandise as between the 7 stores, which has increased since respondent ceased, in March, 1962, to operate a central grocery warehouse (J.A. 113-114, 125, 141-145, R. Exs. 5, 6, 7); to the extent that some merchandise is delivered to the stores by vendors, all of the vendors are

selected by respondent's central office, the prices paid the vendors are negotiated only by respondent's central office executives; vendors are paid directly by the central office, and store personnel are not aware of prices paid by respondent to such vendors (J.A. 131-141); all personnel records are maintained at respondent's central office (J.A. 130-131); daily receipts from all stores are transferred daily to respondent's central bank accounts (J.A. 156-157); all employees of all 7 stores are paid by and from the central office (J.A. 125, 174-175); promotional sales are always conducted on a uniform chain-wide basis (J.A. 148-149); all radio advertisements and some newspaper advertisements identify the locations of all 7 stores (J.A. 177, 208-209); respondent's wage classification structure and wage rates, and its system of automatic length-of-service progression from minimum to maximum wage rates within each job classification are uniformly applied to the employees in all 7 stores (J.A. 181-182); all of respondent's many fringe benefit policies, such as those relating to paid vacations, paid holidays, insurance benefits, paid sick leave, profit-sharing and retirement plan and other benefits, apply uniformly to the employees in all 7 stores (J.A. 182-184); an employee's continuous length of service, that is, his seniority, on the basis of which such matters as the extent of paid vacations are computed, is determined by his total period of employment with the chain as a whole (J.A. 123-124, 176, 260-261, 272-273); general wage increases, when granted, are granted uniformly throughout all 7 stores (J.A. 181-182, 209); respondent contracts with outside firms who render mechanical and laundering services on a chain-wide basis (J.A. 176-177); there is substantial interchange of employees among the 7 stores, on a permanent as well as on a temporary basis, and most transfers are for the convenience of the respondent's chain-wide operations (J.A. 171-174, R. Ex. 15); employees of certain

departments, such as meat, produce, and delicatessen, are hired only by central office executives, and full-time grocery clerks are hired either by the central office or by the particular central office executive to whom is assigned overall responsibility for the day-to-day operations of a particular store (J.A. 122, 153-155, 165-166, 203-204, 211-212, 261-265, 416-417); most part-time employees are hired by the central office executive who divides his working time between respondent's central office at Chelmsford and the particular store for which he has overall responsibility (J.A. 153-154, 165-166); and all cashiers, whether full-time or part-time, are trained by a central office executive who makes the final determination of whether the employees are qualified for the cashier's work and whether they are to be retained or terminated (J.A. 153-154, 262-263). Almost all firing is handled by the central office executive who, in addition to his chain-wide duties, has overall responsibility for the particular store, and no discharges are effected without consultation with that executive (J.A. 166). The number of employees to be utilized in each store is determined by the central office on the basis of a certain chain-wide formula (J.A. 168-169, 204-206). Unemployment, withholding and Social Security taxes are handled on a chain basis at the Chelmsford office, and Workmen's Compensation insurance and public liability insurance are purchased on a chain-wide basis (J.A. 175). A Company newspaper is distributed to all 7 stores (J.A. 175). An annual picnic is held for the employees in all 7 stores (J.A. 175). A single employment application form is used in all stores, and all new employees, to whichever store they may be assigned, receive the same employee's manual of rules (J.A. 166-167). A single security officer, working out of the central office at Chelmsford, handles cases of employee dishonesty for all 7 stores (J.A. 170, 206). Some employees regularly divide their normal workweek between two stores, and frequently an employee,

in addition to performing his normal workweek in one store, works overtime in another store (J.A. 174-175). In all such cases, the employee dividing his time between two stores is paid by a single check issued by respondent's Chelmsford office (J.A. 174-175).

The central office executives determine how stock shall be stocked and displayed in all the stores, and even prescribe the uniform methods by which meats are to be cut in all 7 stores (J.A. 133, 145-146).

Argument

Introduction

Neither the petitioner's statement of "Question Presented"[7] nor that portion of its brief entitled "Reasons for Granting the Writ",[8] makes quite clear what Board policy appears endangered by the decision of the court below. Throughout its argument, petitioner speaks alternatingly of (a) its unit policy in the retail industry as that policy was adopted in 1962 in *Sav-On Drugs, Inc.*, 138 NLRB 1032, 1033, and (b) a policy first enunciated in 1964 in *Frisch's Big Boy Ill-Mar, Inc.*, 147 NLRB 551, where the Board stated that "a single store unit is presumptively appropriate."

(1) Prior to 1962, the Board policy held that the appropriate unit in a retail chain should consist of all the employees within an administrative division or a geographical area. *Weis Markets, Inc.*, 125 NLRB 148 (1959); *Daw Drug Co.*, 127 NLRB 1316 (1960).

(2) In *Sav-On Drugs, Inc.*, the Board, in 1962, revised its unit policy in retail chain store cases, and, in holding a one-store unit of that drug store chain appropriate for bargaining, stated that each retail unit case would there-

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[7] Petition, pp. 2-3.

[8] Id., pp. 12-18.

after "be determined in the light of all the circumstances of the case."[9] The Board stated further:

> "...We have simply added the *possibility* . . . .that a single location or a grouping other than an administrative division or geographical area *may be appropriate*..."[10] (Emphasis supplied.)

(3) In 1964, the Board, in *Frisch's Big Boy Ill-Mar, Inc.*, in holding a one-store unit of that chain appropriate, stated that "...a single-plant unit is presumptively appropriate unless it be established that the single plant has been effectively merged into a more comprehensive unit so as to have lost its individual identity. . . ."[11] On the facts of the particular case, the court denied enforcement of the Board's 8(a)(5) order on the grounds that the ten stores of the chain were "...as much alike as peas in a pod."[12] It is significant that in the *Frisch* case, the Board reasserted the policy (earlier enunciated in *Sav-On Drugs, supra*) that "...The Board will determine the appropriateness, or want thereof, of a proposed unit confined to one of two or more retail establishments in a chain, not by any rigid yardstick, but in the light of all the relevant circumstances of the particular case."[13] In *Clermont's, Inc.*, decided in 1965, the Board, in referring to its earlier decisions in *Sav-On* and *Frisch's*, expressly stated, "But those cases do not stand for the proposition that a single-store unit is appropriate in all circumstances. . . ."[14]

The petitioner charges that the court below has rejected

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[9] 138 NLRB 1032, 1033.

[10] Ibid, n. 4.

[11] 147 NLRB 551, n. 1.

[12] *N.L.R.B.* v. *Frisch's Big Boy Ill-Mar, Inc.*, 356 F.2d 895, 896 (7th Cir. 1966).

[13] 147 NLRB, 551, 552.

[14] 154 NLRB 1397, 1402.

the application of the *Frisch* presumption, but at various points in the Petition, complains that the court below has improperly interfered with the Board's application of the single-unit policy laid down in *Sav-On Drugs, supra.* Respondent submits that both contentions are without merit.

Respondent contends that the Board's Supplemental Decision in the instant case, pays but lip service to its own rule that retail unit questions "be determined in the light of all the circumstances of the case." In its original decision of February 3, 1965,[15] the Board made no reference to any presumption, although *Frisch* had been decided some 8 months earlier.[16] It was only following the court's order remanding the case that the Board, for the first time, in its Supplemental Decision, felt constrained to invoke its policy of presumption, rather than making a full and fair evaluation of the evidence on the record as a whole.

Respondent contends that petition for writ of certiorari should be denied because:

(1) The single store unit here sought is shown by the overwhelming preponderance of evidence to be inappropriate for bargaining purposes.
(2) The Board's presumption fell before an avalanche of rebutting evidence.
(3) The Board's Supplemental Decision is not supported by substantial evidence on the record considered as a whole, but reflects an unreasonable, arbitrary, and even capricious treatment of the evidence.
(4) The decision of the court below is fully consistent with the proper scope of judicial review, and is not in conflict with the decisions of any other circuits.

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[15] J.A. 310-320.
[16] 147 NLRB 551 (June 19, 1964).

I. A Unit Limited to the Respondent's Peabody, Massachusetts Store Only is Inappropriate for Collective Bargaining Purposes.

(A)(1) Respondent cannot be held to have unlawfully refused to recognize and bargain with the union unless the union had been designated or selected by a majority of the employees in a unit appropriate for bargaining.[17] *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146; *Page Aircraft Maintenance, Inc.*, 123 NLRB 159; *Quality Food Markets, Inc.*, 126 NLRB 349.

While Section 9(b) of the Act empowers the Board to determine what constitutes an appropriate unit, its determinations must not be arbitrary or capricious or constitute an abuse of discretion. *N.L.R.B.* v. *Pittsburgh Plate Glass Company*, 270 F.2d 167 (4th Cir.), *cert. denied*, 361 U.S. 943 (1960); *N.L.R.B.* v. *Hearst Publications*, 322 U.S. 111; *May Department Stores Co.* v. *N.L.R.B.*, 326 U.S. 376; *Pittsburgh Plate Glass Company* v. *N.L.R.B.*, 313 U.S. 146; *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474. In *Universal Camera Corp.* v. *N.L.R.B.*, *supra*, this Court pointed out that Congress has imposed on the Circuit Courts the "responsibility for assuring that the Board keeps *within reasonable grounds. . .*" (Emphasis supplied)

(2) In making unit determinations, the Board "has traditionally looked to such factors as the community of interest among the employees sought to be represented."[18] Respondent submits that the facts in this case show that the employees in all 7 of its stores have an almost total mutuality of interest in wages, hours, and working conditions, and the seven stores are so integrated that the only unit here appropriate would be a unit of the employees in all

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[17] Section 9(a) of the National Labor Relations Act.
[18] Petition, p. 13.

7 stores. *N.L.R.B.* v. *Frisch's Big Boy Ill-Mar, Inc.*, 356 F.2d 895 (7th Cir. 1966); *Pittsburgh Plate Glass Company* v. *N.L.R.B.*, 313 U.S. 146 (1941).

In this connection, the court below, in its opinion of December 30, 1965, stated that "it would be difficult to find a more integrated operation."[19]

In its latest decision of May 8, 1967, the court below concluded that:

> "The evidence and the Board's specific findings based thereon disclose a small, compact, homogeneous, centralized and integrated operation. The findings now made confirm this court's previous view that 'it would be difficult to find a more integrated operation, or less difference among employees.' Under some circumstances a single store in a retail chain may constitute an appropriate bargaining unit. *But on the evidence and findings in this case* we can see no rational basis for fractionating the respondent's organization for purposes of collective bargaining." (Emphasis supplied)[20]

The Board's Supplemental Decision is as inadequate and defective as its original decision in the manner in which it treated the record. To the petitioner's contention that unit determinations are left to the Board's expertise, respondent submits that the Board's expertise does not show here, and, furthermore, that expertise may not be substituted for evidence.[21]

(B) *The Board's Supplemental Decision Mistreats the Record.* Despite the Board's claim to have "painstakingly reexamined" the entire record "including the Court's Decision, and the briefs of the parties,"[22] its Supplemental

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[19] Petition, p. 28.
[20] Petition, pp. 54-55.
[21] H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 53-54 (1947).
[22] Board's Supplemental Decision, see Petition, p. 30.

Decision paid little heed to the record and to the criticisms made by the court below in its opinion of December 30, 1965.[23]

(1) *Misstatement of the Record.* In determining unit questions in retail chains, the Board has, for many years, attached great significance to the interchange or transfer of employees between the separate establishments. The presence of "'substantial' or 'some' interchange among [retail] locations supports a unit combining them, while 'minimal' or no interchange shows the appropriateness of a single location." 79 Harv. L. Rev. 811, 829-831.[24]

(a) Respondent's Exhibit 15 showed the great frequency with which employees were transferred from one to another of respondent's stores. The Board's treatment of this important exhibit is, at one and the same time, mechanical, careless, misrepresentative of the true contents of the exhibit, and capricious.

(b) The Board mechanically finds that such interchange "represented an average of about one transfer per week" insofar as the Peabody store was concerned.[25] The Board ignores the fact that Respondent's Exhibit 15 shows a total of 557 employee transfers between the 7 stores in the 2-year period covered by the exhibit. In averaging out the 118 transfers into or out of the Peabody store, the Board fails to evaluate the significant facts that in many instances two or more employees were transferred into or out of the Peabody store within a single workweek, and that some employees regularly divide their working time

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[23] Petition, pp. 22-28.

[24] For the significance attached to interchange, see: *Safeway Stores, Incorporated*, 96 NLRB 998 (1951); *Meijer Supermarkets, Inc.*, 142 NLRB 513 (1963); *Banco Credito Y Ahorro Ponceno*, 160 NLRB No. 119 (1966); *Lane Drug Co., Division of A. C. Israel Commodity Corp.*, 160 NLRB No. 86 (1966); *Raymond's, Inc.*, 161 NLRB No. 80 (1966).

[25] Supplemental Decision, n. 16, Petition, p. 42.

between two of respondent's stores.[26] The comments in footnote 10 of the Petition are, in the language of this Court, unacceptable, since they are only "appellate counsel's post hoc rationalizations."[27] Counsel's post hoc comment (in that same footnote) that transfers are on a voluntary basis, neglects to add that transfers were generally for the convenience of the respondent.

(c) The Board's Supplemental Decision grievously misstates an important part of the record when it states:

> "Moreover, the weight to be assigned to employee interchange as a reliable measure of actual, functional integration is lessened where, as here, the Employer has engaged in an unlawful campaign to undermine the designated representative and *the evidence concerning the interchange appears limited to that which occurred after the Employer acquired knowledge of the Union's organizational interest.*" (Emphasis supplied) (Supp. Dec., N. 16; Petition, p. 42).

The uncontroverted facts are:- The union's drive started on May 13, 1964 (J.A. 8-9, 91-92, 304-305, 322-323), and respondent first learned of the drive on that same May 13, 1964 (J.A. 186, 268, 324), while Respondent's Exhibit 15 reflects 557 employee transfers which took place in the 2-year period from June, 1962 to May 30, 1964. Almost all of the transfers shown on Respondent's Exhibit 15 antedate the commencement of the union's drive.

(d) The Board's statement which would denigrate the character and importance of Respondent's Exhibit 15 by relating it to the 8(a)(1) violations by the respondent, is a capricious statement. Evidence and findings of acts of

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[26] Supplemental Decision, n. 16, Petition, p. 42. The court below had expressly commented on this failure by the Board. See Petition, p. 26, n. 18 to 1965 decision of court below.

[27] See, *N.L.R.B.* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438.

interference which are violation of Section 8(a)(1) of the Act have no relevance to the issue of appropriate bargaining unit.

Curiously, the Petition makes no mention of the Board's mistreatment of Respondent's Exhibit 15.

(2) Footnote 16 to the Board's Supplemental Decision[28] dismisses the interchange of merchandise among the 7 stores as failing to reflect "the degree of operational integration necessary to defeat either the separate identity of the Peabody store, or its inherent appropriateness as a bargaining unit." The Board ignores the fact that in March, 1962, respondent gave up its dry grocery warehouse in Chelmsford; and that the stores do not have space in which to store shelf stock, and serve as auxiliary warehouses to one another. In neither of its decisions does the Board either mention or consider Respondent's Exhibits 5, 6, and 7, showing the thousands of interstore transfers of merchandise.

(C) *Geographical Proximity of the Stores.* The Board's Supplemental Decision states, "Being located about 30 miles from Chelmsford, and about 10 miles from the nearest of Respondent's remaining stores, it [the Peabody store] is separated geographically and serves a different trade area from Respondent's other facilities."[29] Respondent submits that there is no evidence supporting the Board's statement that the Peabody store serves a different area. It is arguable that certain of the stores serve some areas in common. The relatively small distance between stores is not here determinative in view of the fact that, from a labor relations point of view, there is a full integration of the employees of all 7 stores with respect to wages, hours of work, and working conditions. Respondent's Exhibits 5, 6, 7, and 15 indicate that both merchan-

[28] Petition, p. 42.
[29] Supplemental Decision, see Petition, pp. 37-38.

dise and personnel are transferred with great frequency among the 7 stores without regard to any geographical separation. Those exhibits indicate numerous such transfers between the Peabody and Saxonville stores, the two most widely separated of respondent's stores. See *Mary Carter Paint Co.*, 148 NLRB 46 (1964), where the Board held all 17 stores of the chain to be so integrated as to constitute one multi-store unit, although 3 of the stores were located 60 miles away from the other 14 stores.

(D) *Board's Generalized Assumptions.* Rather than applying the principle enunciated in *Sav-On Drugs, Inc.*[30] the Board's Supplemental Decision would substitute many generalized assumptions in place of evidence, the assumptions being unsupported by evidence in the record or contrary to the evidence.

(1) The Board concludes, for example, that, ". . . the Peabody store is not dissimilar from the traditional retail chain outlet insofar as it functions as a distinct economic unit within Respondent's overall operations."[31] Not only is there no evidence of what constitutes a "traditional retail chain outlet," but whatever evidence is found on the record on this point is contrary to the Board's assumption. Thus, the uncontradicted testimony established that: While other chains vary the prices of given items from store to store, in the Purity stores prices are uniform throughout the chain (J.A. 132-134, 140-142, 146-150); unlike other companies, respondent does not have an inventory team, but its regular personnel are transferred from store to store to help out on the inventories (J.A. 175-176). There is no evidence that in other chains central office executives, like those employed by respondent, are assigned overall responsibility for certain stores in addition to the performance of their chain-wide functions of purchasing and

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[30] 138 NLRB 1032, 1033.

[31] Supplemental Decision, see Petition, p. 37.

merchandising (J.A. 133-135, 150-151). There is no evidence that any other chain has a formula utilizing chain-wide data for determining how many manhours of employment are to be authorized in operating a given department in one of the respondent's stores (J.A. 168-169).

(2) The Board states that, "The Peabody store employees regularly work together and have common interests in relation to their Employer, *some of which are separate and apart from those of employees in other locations.*" (Emphasis supplied) [32] The Board gives no explanation of this cryptic statement, nor does it state a single significant aspect of employment (whether in terms of wages, hours of work, or conditions of employment) in which the Peabody store employees are "separate and apart," or different from the employees in the other six stores. There is no such evidence of apartheid on the record of this case.

(E) The Board's Supplemental Decision speaks, at many points, of respondent's "centralized control" of its chain of seven stores,[33] of the "administrative structure of the chain",[34] of respondent's "administrative control" over the seven stores.[35] Notwithstanding such centralized administrative control, the Board finds that the individual Peabody store possesses sufficient autonomy [36] so as to warrant the conclusion that the Peabody store is a "distinct, self-contained economic unit," which "will neither preclude Respondent's continued reliance upon centralized policy determinations," and the Board further concludes that "the impact of any labor dispute at the Peabody store is not likely to be felt at the Respondent's other

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[32] Supplemental Decision, see Petition, p. 40.
[33] Petition, p. 37.
[34] Id., p. 41.
[35] Id., p. 42.
[36] Id., pp. 38, 40.

outlets which serve different markets." And finally, says the Board, separate bargaining at Peabody "would not unduly encroach on the Employer's administrative controls."[37] This unexplained judgment, it is submitted, indicates a lack of expertise.

(1) The evidence does not show the Peabody store to be "a distinct, self-contained economic unit," but shows it to be inextricably integrated as part of a chain of stores. It is naive to say that separate bargaining will have no impact upon the respondent's reliance on centralized control. Insofar as its uniform policies concerning wages, hours of work and all working conditions are concerned, separate bargaining would have an obvious and powerful impact.

If respondent, for example, decided to give a general increase, or any new benefit to all employees, or to change a working condition throughout the chain, any such change unilaterally instituted in a unionized Peabody store would be considered an unlawful refusal to bargain. *N.L.R.B.* v. *Katz,* 369 U.S. 736. In the instant case itself, the Board would find respondent guilty of a Section 8(a)(5) violation by reason of the general wage increase given to all employees in September, 1964.[38] A single-store bargaining unit would indeed preclude respondent's continued reliance on centralized policy determinations.

(2) Bargaining in the Peabody store alone would invite other disruptions in the centralized policies of respondent's operations, — (a) The union at the Peabody store could lawfully require the respondent to bargain on the size of the store crew, thereby preventing respondent from applying the chain-wide data to determine the number of man-hours of employment to be allowed to each department in the store; (b) a union in a single-store

[37] Supplemental Decision, see Petition, p. 44.
[38] Board's Decision and Order of February 3, 1965, J.A. 317-318.

unit might well bring an end to the practice of having uniform rules in all 7 stores (See J.A. 166-167; R. Ex. 12); (c) respondent might well be prevented from continuing its long-standing practice of transferring employees from one store to another. A union in the Peabody store might well object to having overtime work in that store being given to employees from one of the other stores (J.A. 174-175); (d) if it became necessary to reduce the workforce because of a decline in business, the union might well object to an employee from another store being given priority over an employee in the Peabody store where the priority was based on the extent of company-wide seniority (See J.A. 123-124, 260-261, 272-273); (e) and as was validly pointed out by the two dissenting Board members in *Frisch's Big Boy Ill-Mar, Inc.*, 147 NLRB 551, 553-557, a union calling a strike at a single unionized store could lawfully picket the other stores, although the union did not represent the employees of the other stores. *International Brotherhood of Teamsters (Alexander's Warehouse and Sales Company)*, 128 NLRB 916. The Board's decision would unstabilize labor relations in the instant case in a sense never contemplated by Congress when it authorized the Board to make bargaining unit determinations.

(F) *Board's Failure to Treat with Trial Examiner's Rulings.* The trial examiner, in questioning the materiality of certain evidence bearing on the unit question, indicated his misunderstanding of the importance of the unit issue in a Section 8(a)(5) case where he stated, "Well, I'm not going into a full representation hearing here." (J.A. 120). The trial examiner excluded highly relevant evidence: — that when respondent purchased its Winchester store in 1961, it automatically placed its chain-wide wage policy into effect in that store (J.A. 181); that respondent had a policy, applicable to employees of all

stores, of paying the difference between the employee's normal week's wages and the compensation derived from serving on a jury or when called to National Guard or Reserve duty (J.A. 184). In its February 3, 1965 decision, the Board stated it had ". . . reviewed the rulings of the Trial Examiner . . . and finds no prejudicial error was committed." The Board affirmed the rulings. Its Supplemental Decision fails to mention the trial examiner's rulings.

The Board's 8(a)(5) decision can hardly be said to be supported by substantial evidence on the record considered as a whole. Its decision on the unit question may also be fairly characterized as being unreasonable, arbitrary, and even capricious, the latter term appearing particularly apt in describing the manner in which the Board treated Respondent's Exhibit 15 which deals with interchange of employees.

(G) *The Board's Presumption.* The petitioner contends that the court below rejected the Board's policy of holding a single-store unit presumptively appropriate, and points to the circuit court's statement that, "The Board's simple declaration that single store units are considered 'presumptively appropriate' adds nothing. . ."[39] While first adopting this presumption in *Frisch's* case,[40] the Board made it clear in that same decision that its decisions in such unit cases would continue to be based on the rule of *Sav-On Drugs,*[41] namely, a policy of deciding each case on the basis of all the facts in the particular case.

Such a presumption is a rebuttable one, and where rebutting evidence is offered, the presumption disappears as a rule of law, and the case must be decided on the

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[39] Petition, p. 56.
[40] 147 NLRB 551 (1964).
[41] 133 NLRB 1032 (1962).

evidence on the record considered as a whole. 9 *Wigmore on Evidence,* 3d ed., § 2491(2) and (3). It is difficult to understand how the petitioner states that, ". . . no factors rebutting the presumption were present."[42]

In arguing that the court below rejected the Board's policy of applying the presumption, the petitioner misreads the opinion of the court below. The circuit court's decisions of December 30, 1965 and May 8, 1967, were both based on a detailed review of all the evidence on the record as a whole.

The statement in the latest opinion of the court of appeals that, "The Board's simple declaration that single store units are considered 'presumptively appropriate' adds nothing. . . ."[43] appears after a lengthy, detailed discussion of the evidence concerning the unit question.[44] Senior Circuit Judge Woodbury, writing for the court below, said:

> "The evidence and the Board's specific findings based thereon disclose a small, compact, homogeneous, centralized and integrated operation. The findings now made confirm this court's previous view that 'it would be difficult to find a more integrated operation, or less difference among employees.' "[45]

What Judge Woodbury says is that, after reviewing the substantial evidence rebutting the presumption and considering the evidence on the record as a whole, the Board's statement that a single-store unit is "presumptively appropriate" — adds nothing in the overall context of the case.

That the court had, indeed, arrived at its decision on

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[42] Petition, pp. 8-9; See Board's Supplemental Decision, Petition, pp. 46-47.
[43] Petition, p. 56.
[44] *Id.*, pp. 48-56.
[45] *Id.*, pp. 54-55.

the basis of the record considered as a whole is further sustained by the court's statement that:

> "Under some circumstances a single store in a retail chain may constitute an appropriate bargaining unit. *But on the evidence and findings in this case* we can see no rational basis for fractionating the respondent's organization for purposes of collective bargaining." (Emphasis supplied) [46]

II. THE DECISION OF THE COURT BELOW IN SETTING ASIDE THE BOARD'S SECTION 8(a)(5) ORDER WAS CONSISTENT WITH THE PROPER SCOPE OF JUDICIAL REVIEW.

(A) In *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 490-491 (1951), this Court, in treating with the responsibility of the circuit courts in reviewing Board orders, stated that the circuit courts had responsibility for "assuring that the Board keeps within reasonable grounds", and in this connection, this Court said:

> "Our power to review the correctness of the present standard ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Court of Appeals. This Court will interfere only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied."

Since the petitioner's contention here raises only an evidentiary issue which was resolved against the petitioner by the court of appeals, the petitioner's contention does not warrant review by this Court. It is clear from the facts summarized in the Statement (pp. 2-7, *supra*) that the Board's unit determination is not supported by substantial evidence on the record considered as a whole.

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[46] *Id.*, p. 55.

(B) This is not a rare instance where the standard of review "appears to have been misapprehended or grossly misapplied" by the court below. The Board's Supplemental Decision states that ". . . we have consistently upheld the appropriateness of such a [single-store] unit where sought. . ."[47] The petitioner here misstates its own record of decisions issued subsequent to the 1962 *Sav-On Drugs* decision. In a number of its post *Sav-On Drugs* cases, the Board has held a single-store unit to be inappropriate, and has held a multi-store unit to be the only appropriate unit. *Caribbean Restaurants, Inc.*, 162 NLRB No. 60 (1967); *Mary Carter Paint Co.*, 148 NLRB 46 (1964); *Weis Markets, Inc.*, 142 NLRB 708 (1963); *Meijer Supermarkets, Inc.*, 142 NLRB 513 (1963). See: *Clermont's, Inc.*, 154 NLRB 1397 (1965) and cases cited in footnote 13.

The Board's statement that it has applied the unit policy of *Sav-On Drugs* in more than 30 formal decisions[48] issued since *Sav-On Drugs*, indicates that the Board's retail unit decisions, even subsequent to the *Frisch* decision, rest upon all of the relevant facts in the particular case rather than resting on a presumption. Indeed, most of the Board's retail unit decisions since the 1964 *Frisch* case, *supra*, have made no reference to any presumption and have been based on "all the circumstances" of the particular case. *Lou De Young's Market Basket*, 159 NLRB No. 54 (1966); *J. L. Hudson Company*, 155 NLRB 1345 (1965); *Big Bear Stores Company*, 155 NLRB 75 (1965); *Primrose Super Market of Salem, Inc.*, 148 NLRB 610 (1964); *J. W. Mays, Inc.*, 147 NLRB 968 (1964); *Leeds Shoe Store*, 149 NLRB 500 (1964); *Mary Carter Paint Co.*, 148 NLRB 46 (1964). See, also, *Clermont's, Inc.*, 154 NLRB 1397 (1965). It is submitted that the decision of the court below was based

[47] Petition, p. 46.
[48] Petition, pp. 12-13.

upon the court's review of all of the evidence on the record considered as a whole.

(C) *There is No Conflict between Circuits.* The petitioner concludes its argument by stating, "The issue thus emerges well defined: it is the validity of the single-store policy."[49] The petitioner contends that the conflict which exists between the First Circuit on the one hand, and the Third, Sixth and Ninth Circuits, on the other hand, arises from Judge Woodbury's statement that the presumption added nothing to the instant case, the petitioner arguing that this constituted a rejection of the Board's right to hold a single-store unit presumptively appropriate.[50] Petitioner cited, in this connection, *N.L.R.B.* v. *Sun Drug Co.*, 359 F.2d 408, 412-413 (3rd Cir.); *N.L.R.B.* v. *Winn-Dixie Stores, Inc.*, 341 F.2d 750, 755 (6th Cir.), enforcing 143 NLRB 848, 860-861, *cert. denied*, 382 U.S. 830; *N.L.R.B.* v. *Merner Lumber and Hardware Co.*, 345 F.2d 770, 771-772 (9th Cir.), enforcing 145 NLRB 1024, *cert. denied*, 382 U.S. 942. The petitioner also directs attention, in this regard, to *N.L.R.B.* v. *Primrose Super Market of Salem, Inc.*, (1st Cir.), 58 LRRM 2863, enforcing without opinion 148 NLRB 610, *cert. denied*, 382 U.S. 830. In every one of those decisions, although a single-store unit was determined appropriate, there was no mention whatever of any presumption, and in every one of those cases, the determination is clearly indicated as having been made on the basis of all of the relevant factors in the particular case. The same standard of review was applied by the court below in the instant case.

The single-store unit was determined to be appropriate in the cases cited by the petitioner, because of a difference in facts as between those cases and the instant case. Such a factual difference in no way establishes a conflict be-

[49] Petition, p. 18.
[50] Id., pp. 12-18.

tween the circuits, either on a question of substantive law or on a question of the proper scope of judicial review.

(D) *Additional Question Warranting Argument if Certiorari is Granted.* Respondent believes that the petition for certiorari should be denied for the reasons set forth above in this brief, but in the event that this Court should grant certiorari, respondent respectfully requests that the Court permit argument on the following additional question:

> "Was the union's claim to majority status tainted and rendered invalid because of threats and coercion by those soliciting union authorization cards from respondent's employees?"

Having found that Richard LeGrow, a 17-year old employee was threatened with physical violence to make him sign a union authorization card (J.A. 250-252), the Board would simply disregard his card in determining whether the charging union had acquired majority status. The court below left the Board's ruling on this point undisturbed; although the court felt the Board's ruling to be "very close to impermissible" (Petition, p. 21). Neither the Board nor the court below mentions additional evidence that employees Marion Sawyer and Robert Smith were subjected to coercive conduct by those soliciting for the union (J.A. 189-190, 217-218). Respondent contends that such evidence rendered the union's claim to majority status invalid, and for that additional reason the Section 8(a)(5) refusal-to-bargain charge should be dismissed.

In *General Shoe Corporation*, 77 NLRB 124, 127 (1948), the Board established its principle that its elections should be held under laboratory-like conditions. The Board has set aside elections upon a showing that a single employee has been threatened or coerced. *U.S. Rubber Co.*, 86 NLRB 3; *Poinsett Lumber and Manufacturing Company*, 116

NLRB 1732; *N.L.R.B.* v. *Tampa Distributors, Inc.*, 272 F.2d 470 (5th Cir.); *N.L.R.B.* v. *James Thompson & Co.*, 208 F.2d 743 (2nd Cir.).

Respondent urges that an equal and even stricter yardstick of conduct should apply where, as here, a union seeks recognition via a refusal-to-bargain charge and without election. The decision of the court below on this question, is in conflict with the decision of the Second and Fifth Circuits. *N.L.R.B.* v. *Tampa Distributors, Inc., supra; N.L.R.B.* v. *James Thompson & Co., supra.* In *James Thompson & Co., supra,* the court denied enforcement of an 8(a)(5) order, Circuit Judge Learned Hand stating that it was not necessary to show the extent to which the coercion permeated employees in the bargaining unit. See: *N.L.R.B.* v. *Gorbea, Perez & Morell,* 300 F.2d 886 (1st Cir.).

If certiorari is granted, this additional question warrants review because of a conflict between circuits and because it is an important question arising under the administration of the Act.

Conclusion

The petition for writ of certiorari should be denied.

Respectfully submitted,

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Appendix A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.) are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

. . .

REPRESENTATIVES AND ELECTIONS

SEC 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or

other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, or subdivision thereof: *Provided,* That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

. . .

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. . . . (e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings,

by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.